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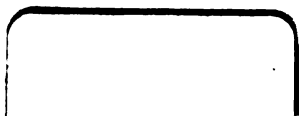
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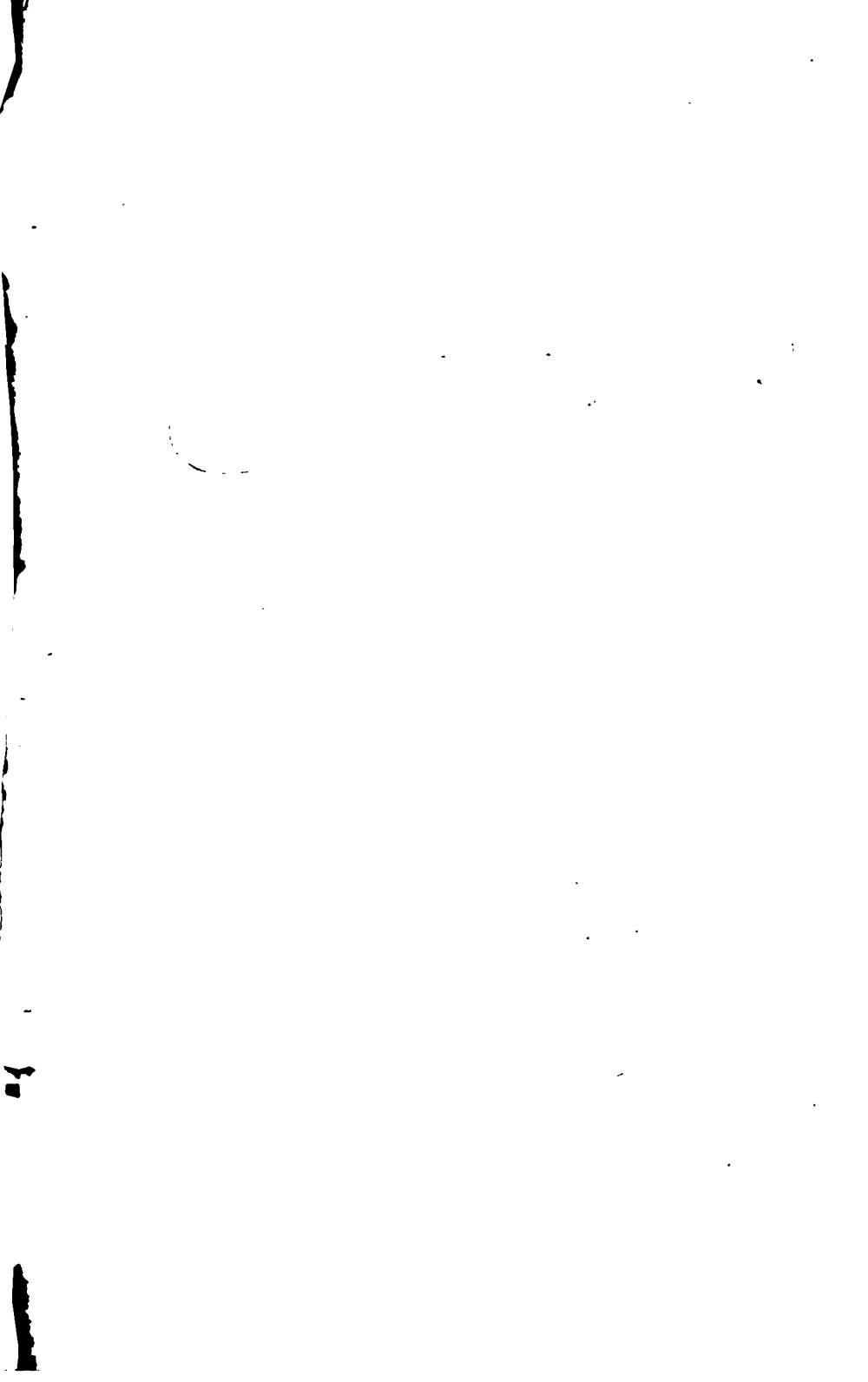
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# ANALYTICAL DIGEST

OF THE DECISIONS OF THE

## SUPREME COURT OF JUDICATURE

OF THE

### PROVINCE OF NEW BRUNSWICK.

BY

JAMES GRAY STEVENS, Q.C.

*Judge of the County Courts of the Counties of Charlotte, Carleton, Victoria,  
and Madawaska.*

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### SECOND EDITION.

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FROM 1825 TO EASTER TERM (INCLUSIVE) 1879.

[See pages 1277 to 1300 for Cases in Hilary and Easter Term, 1879.]

CONTAINING THE CASES AS REPORTED IN THE MANUSCRIPT REPORTS OF THE  
LATE CHIEF JUSTICE CHIPMAN, AND THE RESPECTIVE REPORTS OF  
THE LATE GEORGE F. S. BERTON, ESQ., DAVID S. KERR,  
ESQ., Q.C., THE PRESENT CHIEF JUSTICE ALLEN AND  
MESSRS. HANNAY, FUGSLEY, AND FUGSLEY  
AND BURBIDGE, BARRISTERS-AT-LAW,  
TOGETHER WITH SEVERAL UNRE-  
PORTED CASES.

CARSWELL & CO., LAW BOOK PUBLISHERS,  
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Rec. June 9, 1891

TO THE HONOURABLE

JOHN CAMPBELL ALLEN,

CHIEF JUSTICE OF THE SUPREME COURT OF JUDICATURE OF THE  
PROVINCE OF NEW BRUNSWICK.

SIR,—

With your kind permission I dedicated the first edition of this digest to you in acknowledgment of the kind assistance rendered to me by you in its preparation. Since that time an honourable and justly deserved recognition of your abilities and worth has been rendered by your elevation to the position of Chief Justice of the Court, in which, as one of its puisne Judges, you so long held a prominent place.

By your permission I gratefully dedicate this second edition to you in your capacity of Chief Justice, heartily desiring you may be long spared to administer the laws of our Country with that impartiality and ability which have so long characterised your judicial position.

JAS. G. STEVENS.





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JAS. G. STEVENS.



# PREFACE.

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A second edition of the digest of the Reports of the Supreme Court of New Brunswick has been prepared sooner than was in contemplation, owing to the destruction of the unsold copies of the first edition in the hands of Messrs. McMillan, Saint John, by the late disastrous fire in that city, and the loss from same cause of many copies in the private libraries.

At the urgent suggestion of several of the members of the bar, I have undertaken and completed this second edition, bringing down the digest of cases to Easter Term, inclusive, 1879.

Since the publication of the first edition, the cases in same marked as unreported, have, with some few exceptions, now appeared in the first volume of reports of William Pugsley, Esq., and the fifth and sixth volumes of reports of the Honourable John C. Allen, and references are now made to these respective reports, instead of, as in former edition, to the term and year in which judgment was delivered; a few cases have been overlooked and remain in the digest cited as of the term and year, but are *corrected and properly cited* as of the respective published reports in the *index of names of cases*.

Some few cases remain still unreported, the full judgments in same having been lost or mislaid.

Whilst these are not numerous, there are several additional cases now reported in full which did not appear in



## PREFACE.

first edition of the digest by note or otherwise, and the profession will duly appreciate the praiseworthy, although long delayed action of the Legislature, in having provided for the publication in full of the most able and valuable reports of cases as are now contained in reports known and cited as fifth and sixth Allen's reports.

My distance from the publisher's press has prevented me from revising with such care as I desired the proof sheets, and correcting several minor errors and inaccuracies chiefly occurring in names and figures, which, however are in most part, where considered necessary, noted in the errata.

The profession will, I trust, duly appreciate the particular care exercised by the publishers in the execution of their part, and it is hoped that the general workmanship and style of book will prove satisfactory.

I have endeavoured to make the present edition as complete and serviceable to the legal profession as such an undertaking demanded, and asking their considerate indulgence to its defects, I trust it may prove, what,—with much labour I have endeavoured to make it—a useful help to the practising lawyer.

JAS. G. STEVENS.

SAINT STEPHEN, N.B., January, 1880.

# CHIEF JUSTICES

## AND

### JUDGES OF THE SUPREME COURT,

FROM THE FIRST SITTING OF THE COURT IN 1785 TO THE PRESENT TIME.

CHIEF JUSTICES.	Appointed.	Resigned.	Died.	
George Duncan Ludlow.	Nov. 25, 1784		Nov. 13, 1808	
Jonathan Bliss.	June 28, 1809		Oct. 1, 1822	
John Saunders.	Oct. 19, 1822		May 24, 1831	
Ward Chipman.	Sept. 23, 1834	Mich. Va. 1850	Nov. 28, 1851	
Sir James Carter.	Jan. 8, 1851	Sept. 1865		
Robert Parker.	Sept. 22, 1865			
William J. Ritchie.	Dec. 3, 1865			
John C. Allen.	Oct. 8, 1875			
<b>JUDGES.</b>				
James Putnam.	Nov. 25, 1784			
Isaac Allen.	Nov. 25, 1784		Oct. 12, 1811	
Joshua Upham.	Nov. 25, 1784			
John Saunders.	Oct. 20, 1790		May 24, 1834	Chief Justice.
Edward Winslow.	July 2, 1807		July 1815	
Ward Chipman, Sen.,	June 28, 1809		Feb. 9, 1821	
John Murray Bliss.	July 9, 1816		Aug. 22, 1834	
Edward J. Jarvis, (temporary appointment from October 1822 to April 1823)				
William Botsford.	April 2, 1823	Dec. 1845	May 8, 1844	
Ward Chipman.	Mar. 17, 1825	Mich. Va. 1850	Nov. 26, 1851	Chief Justice.
Sir James Carter.	July 12, 1834	Trin. Va. 1865		Chief Justice.
Robert Parker.	Oct. 6, 1834			1865 Chief Justice.
George Frederick Stroet.	Dec. 20, 1845			1855
Lemuel A. Wilmet.	Jan. 8, 1851		May 21, 1858	
(Appointed Lieut.-Governor of New Brunswick, July, 1868)				
Neville Parker, M. R.,	1854		August 1870	
(Court of Chancery was abolished, and the Master of Rolls was transferred to Supreme Court by Act 17 Vic. cap. 671.)				
William J. Ritchie.	Aug. 17, 1855			Chief Justice
was appointed a Puisne Judge of the Supreme Court of the Dominion, 4th October 1875, and Chief Justice of same in 1878.				
John C. Allen.	Sept. 22, 1865			
was appointed Chief Justice of Supreme Court, October 8, 1875.				
John W. Weldon.	Dec. 6, 1865			Present C. J.
Charles Fisher.	Oct. 1863			
A. Kainsford Wetmore.	May 25, 1870			Puisne Judges
Charles Duff.	Oct. 8, 1875			
Aulus L. Palmer.	June 1879			Equity Judge

## JUDGES OF COUNTY COURTS.

JUDGES.	COUNTIES	APPOINTED.
James G. Stevens....	{ Charlotte, Carleton, Victoria, and Made- moska..... }	10th June, 1867.
James Steadman....	{ York, Sunbury, and Queens..... }	10th June, 1867.
James W. Chandler..	{ Albert, Westmore- land, and Kent..... }	10th June, 1867, deceased.
succeeded by		
Bliss Botsford.....	{ Albert, Westmore- land, and Kent..... }	24th October, 1870.
Edward Williston....	{ Northumberland, Glocester, and Res- tigouche..... }	10th June, 1867.
Charles Watters.....	{ Saint John, & Kings, and Judge of the Court of Admiralty.. }	1st November, 1876.

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## ABBREVIATIONS.

- C. MS.—Chipman's Manuscript Reports.  
 Ber.—Berton's (George F. S.) Reports.  
 Kerr.—Kerr's (David S.) Reports.  
 All.—Allen's (John C.) Reports.  
 Han.—Hannay's (James) Reports.  
 Pug.—Pugsley's (William) Reports.  
 P. & B.—Pugsley (William) and Burbidge's (George W.) Reports.

## ERRATA.

**NOTE.**—A few cases reported in fifth and sixth volumes of "Allen's Reports" remain cited as in former digest as of the term in which judgment was delivered, but are correctly cited as of 5th and 6th Allen's Reports respectively in the index of names of cases.

It has been considered unnecessary to notice same in the errata.

The following cases cited as of 1872 and 1873 are reported in 1 Pugley Reports and corrected in errata and are properly cited in index of names, viz., *Doe dem. Johnstone v. Jardine*, *Gilbert v. Graham*, *Hannington v. Stewart*, *McCausland v. Power*, *Regina v. Harshman*, *Wood v. The Oarleton Branch Railway Co.*

- Page 15, on 14th line from top, for "award" read "accord."
- " 34, last line, insert before P. & B. "2."
- " 35, tenth line from top, for "2 Han." read "East T. 1871."
- " 36, for "joinder of Courts" read "counts."
- " 55, Note 6, for 6 All. "36" read "56."
- " 60, Note 16, add at foot of note "*McCollum v. Perkins*, 3 Pug. 185."
- " 71, Note 5, on last line, for "moved" read "proved."
- " 88, Note 1, for 1 All. "361" read "561."
- " 95, third line from top, for "17" read "27."
- " 103, Note 6, for "East T. 1872" read "1 Pug. 125."
- " 113, Note 3, for 1 All. "820" read "620."
- " 116, Note 16, for 3 Pug. "299" read "327."
- " 119, Note 8, for 1 Pug. "127" read "226."
- " 173, Note 53, for 3 Pug. "668" read "468."
- " 180, Note 8, for "Dewolfe" read "Spurr."
- " 184, Note 8, for "Heck" read "Peck."
- " 194, Note 17, for 3 Pug. "349" read "249."
- " 201, Note 46, for 4 All. "76" read "77."
- " 265, Note 31, for "Harding" read "Stewart."
- " 282, Note 6, for 5 All. "296" read "150."
- " 300, 3rd line from top, for "523" read "515."
- " 307, Note 2, for 3 Kerr "312" read "212."
- " 338, Note 16, for 2 All. "565" read "365."
- " 345, Note 13, after East T. insert "1871."
- " 352, Note 47, for 1 All. "355" read "492."
- " 373, Note 1, for "Hil. T. 1828" read "C. Ms. 141."
- " 373, Note 5, for 1 Kerr "163" read "136."
- " 376, fifth line from top, for No. "60" read "69."
- " 381, Note 9, for "Hil. T. 1873" read "1 Pug. 242."

# ERRATA.

Page 389, Note 17, after 2 Pug. insert "192."

- " 496, Note 3, for "East T. 1873" read "1 Pug. 333."
- " 496, third line from top, for "598" read "590."
- " 505, Note 5, for 3 Kerr "194" read "687."
- " 508, Note 4, for Ber. "347" read "231."
- " 512, Note 7, for "2" P. & B. read "1" P. & B.
- " 513, Note 5, for 2 Pug. "255" read "355."
- " 514, Note 6, for 6 All. "479" read "470."
- " 554, Note 2, after Coram v. Wheten insert "4 All."
- " 562, Note 23, for "1" Kerr read "2."
- " 568, Note 43, for "Gervais" read "Girven."
- " 589, Note 38, for Savage v. "Hack" read "Stack."
- " 591, Note 4, for "Welch" v. Street read "Wilson."
- " 595, for Doe v. "Fen" read "Fauls."
- " 598, Note 6, for "Cornell" read "Connell."
- " 611, Note 11, for 3 Kerr "645" read "654."
- " 615, Note 1, after 2 all. insert "275."
- " 634, Note 17, for "Gillis" read "Giles."
- " 668, Note 1, for 1 All. "80" read "680."
- " 688, fifth line from top, for "1" P. & B. read "2."
- " 696, Note 3, for "Hil. T. 1827" read "C. Ms. 57."
- " 732, Note 17, for 4 "Kerr" read "All."
- " 742, Note 25, for "Parker" read "Perkins."
- " 783, Note 20, for "McAndrews" read "Saunders."
- " 807, Note 5, for "5" Pug. read "2"
- " 809, on 4th line from top add -see errata omitted case Birch v Perkins, 2 Pug. 327.
- " 820, Note 5, for 5 All. "231" read "531."
- " 822, Note 6, for "East T. 1873" read "1 Pug. 317."
- " 867, under "malicious arrest" insert "Birch v. Perkins, 2 Pug. 327."
- " 871, Note 10, for 5 All. "59" read "559."
- " 873, Note 7, for "Sedden" read "Ledden."
- " 883, second line from top, for 6 All. "334" read "398."
- " 891, Note 21, for 3 All. "439" read "433."
- " 914, Note 17, for "Cark" read "Clark."
- " 914, Note 3, for "Wilson v. Ellis" read "Wilson v. Eills."
- " 933, Note 77, for Coy v. "Teoman" read "Yeoman."
- " 953, Note 8, for Raymond v. "McMachou" read "McMachin."
- " 990, Note 72, for 5 All. "558" read "358."
- " 1002, Note 32, for "Vittrim" read "Vittum."
- " 1011, Note 60, for "Harrington" read "Hanningten."
- " 1023, Note 2, for "Cassmore" read "Passmore."
- " 1028, sixth line from top, before Pug. insert "2."
- " 1030, Note 12, for Judge "no" power read "had."
- " 1036, Note 11, for Abbet v. "French" read "Frink."
- " 1039, Note 32, for Nugent v. "Brown" read "Barron."
- " 1044, Note 11 for Trin. T. "1872" read "1834."
- " 1046, Note 21, for Wheeler v. "Gove" read "Goss."

# ERRATA.

- Page 1063, Note 14, for " 3 Kerr " read " 3 All."
- " 1064, Note 17, for 2 " Kerr " read " All."
- " 1064, Note 20, for 1 All. " 400 " read " 490."
- " 1069, Note 4, for " Home " v. Carson read " Howe."
- " 1136, under note Replevin, for "Austin" v. Howill read "Bustin."
- " 1150, Note 2, second line, for " is a judicial duty " read " is not  
a judicial duty."
- " 1164, Note 11, for " Davisville " v. Ferguson read " Domville."
- " 1172, Note 9, for McIntosh v. " Burners " read " Burnett."
- " 1218, for Doe v. Watson, " 6 All." read " 1 All."
- " 1254, Note 2, for 1 All. " 595 " read " 525."
- " 1216, Note 14, for " iii." 13 read " iv." 13. And see errat.  
Birch v. Perkins, 2 Pug. 327.
- " 1288, insert to case Regina v. Morrison. *Held*, (by Allen, C.J.  
Weldon, Fisher, and Duff, J.J., Wetmore, J., dissenting,) that the indictment was not amendable under 32 and 33 Vic., cap. 29, sec. 32.
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## CASE OMITTED.

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*Should have appeared under Title Trespass V.*

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**Trespass—Justice of the Peace—Action against for false imprisonment—Commitment—Place—Malice—Reasonable and probable cause—Necessity of proof of.**

Information having been laid before the defendant, a Justice of the Peace, against the plaintiff, he issued a summons and copy, but the copy was defective in not containing the return day. The constable made oath before the Justice that he had served a true copy of the summons, whereupon the plaintiff not appearing at the return, the defendant issued a warrant for the plaintiff's arrest. On being brought before the defendant, the plaintiff refused to enter into a recognisance and was thereupon remanded to the "common gaol at Kingston," Kings County, for five days, from which he was discharged by a Judge's order. An Act had just been passed not known to the defendant removing the Shire town from Kingston and making the common gaol of St. John or Westmoreland the common gaol of King's. An action for false imprisonment having been brought against the Justice. *Held*, 1. That as the defendant had jurisdiction over the subject matter of the complaint, and when the constable made the affidavit of service of the summons,—also over the plaintiff's person, trespass would not be without malice or want of probable cause. 2. That the plaintiff's imprisonment at Kingston being only a remand for safe custody until the complaint could be heard, it was legal, though the building was not the common gaol of the county. The power being given by 32 and 33 Vic., cap. 31, sec. 33, Statute of Canada. *Birch v. Perkins*, 2 *Pug.* 327.

# ANALYTICAL DIGEST

OF

THE DECISIONS OF THE SUPREME COURT OF  
JUDICATURE OF THE PROVINCE OF NEW  
BRUNSWICK, FROM 1825 TO MICHAELMAS  
TERM (INCLUSIVE), 1878.

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## ABATEMENT.

*See* Pleading II.

“ Bills and Notes VI., 10, *Kelly v. Ballock*.

“ Partnership. *See* Pleading II., 55, *McDonald v. Cumming*.

**Proceedings against Absconding Debtor not abating  
by death of debtor.**

*See* Absconding debtor, 12. *Ex parte Archibald*.

**Husband and Wife.**

Death of husband. Action does not abate. *See*  
Husband and Wife. *Harrington v. McManamin*.

## ABANDONMENT.

**Of joint trespass on trial.**

*See* Trespass II., 8, *Maloney v. Purden*.

“ “ 12, *Lawton v. Adams*.

“ “ 18, *Ache v. Alexander*.

“ “ 25, *Atkinson v. McAuley*.

**Of right to vote as ratepayer.**

*See* Election 2. *Ex parte Tuttle*.

## ABSCONDING DEBTOR.

**1—Supersedeas.**

The Court has no power under 26 Geo. III. cap. 18, to grant a supersedeas of a warrant of attachment, issued against the goods of a concealed debtor, unless it appears that all the creditors consent thereto. *Ex parte Gore. Ber.* 187. (*See* Now Consol. Statutes cap. 44, sec. 12.)



**2—Refusal to grant Prohibition.**

The Court refused a rule either for a prohibition or *certiorari*, in regard to proceedings under the Absconding Debtors Act, 26 Geo. III, cap. 13, taken before a Judge of an Inferior Court of Common Pleas, it not appearing, upon the affidavits, that the Judge had acted improperly in any part of the proceedings. Application had been made to the said Inferior Court to stay the proceedings, but it did not appear that such application was in the form prescribed by the seventh section of the Act, and the Court, after hearing the parties, made no order in the case. *Ex parte Waite*, 1 Kerr, 175.

**3—Right of Trustees to maintain Trover.**

The trustees of an absconding debtor, duly appointed under the Act 26 Geo. III, cap. 13, may maintain trover to recover the value of certain goods of the debtor, wrongfully converted by the defendant before any proceedings taken under the Act; such right of action being transferred by the operation of the Act from the debtor to the trustees. *Ritchie v. Boyd*, 1 Kerr 264.

**4—Debtor Administrator—Right of Trustees in Property.**

Under the Act of Assembly 26 Geo. III, cap. 13, the trustees of an absconding debtor do not become entitled to the property and credits held by such debtor as administrator of a deceased person. *Wilson v. McBrine*, 2 Kerr 535.

**5—Right of Trustees to sell Property—Possession.**

The trustees of the estate of an absconding debtor appointed under the Act 26 Geo. III, cap. 13, have a right sell and convey the real estate of the debtor, though they have never taken possession. *Doe v. McGuire*, 1 All. 612.

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**Fraudulent Conveyance.**

A conveyance from an absconding debtor, which is found to be fraudulent and void, cannot defeat the title of the trustees; for being void as against credi-

tors, it is also void as against those who represent them. *Ibid.*

**6.—Property seized—Liability for rent.**

Property seized upon a warrant issued under the Absconding Debtors Act (1 Rev. Stat. cap. 125) is not liable to the landlord for a year's rent, though notice of his claim is given to the sheriff before the delivery of the property to the trustees. *Stanton v. Johnson*, 4 All. 54.

**7.—Action against Debtor—Suspension—Bail.**

Proceedings under the Absconding Debtors Act do not suspend an action pending against the debtor; nor are the bail discharged by the plaintiff filing with the trustees his claim against the debtor, and having the amount adjudged. *Christie v. Lawrence*, 4 All. 115.

**8.—Foreign Residence.**

Where a debtor was a resident of the State of Maine but did business in this Province, and went away for the purpose of defrauding his creditors.—*Held*, That he might be proceeded against under the Absconding Debtors Act. *Regina v. Steadman*, 1 Han. 869.

9.—A warrant cannot issue against a person as an absent debtor under 1 Rev. Stat. cap. 125, unless he has been a resident in the Province. *Ex parte Kettle*, 5 All. 81.

**10.—Investing of Property—Notice—Publication.**

Proceedings were taken against S., a debtor, under the Absconding Debtors Act; a warrant issued 27th November, and notice as required by the Act, was published in the Royal Gazette, December 2. The warrant was delivered to the Sheriff of York on the 10th February following. On the 5th February, a creditor of S. having obtained judgment against him in the Supreme Court, issued an execution and recorded a memorial of the judgment in the County of York.—*Held*,—WELDON, J., *dissentiente*,—That the publication of the notice divested S. of the property, and vested it in the trustees, without the issuing of any warrant to the sheriff, and so defeated the execution. Per WELDON, J., That the notice in the Gazette could not be

imported into the case to prevent the plaintiff from reaping the fruits of his judgment. *Kerr v. Scovil*, 2 *Han.* 16.

**11**———The real estate of an absconding debtor is divested by the publication in the Gazette of the warrant of attachment, and vests in the trustees when appointed, and is not affected by a subsequent conveyance by the debtor. Therefore where proceedings were taken against an absconding debtor in February 1860, and notice of the warrant was published in the Gazette in April 1860—*Held*, That the estate of the debtor was thereby divested, and that a subsequent deed from him was inoperative, though the trustees were not appointed until several months after such deed. *Robicheau v. Black*, *Mich. T.* 1871.

**12—Death of Debtor—Effect of Notice.**

Proceedings under the Absconding Debtors Act, 1 Rev. Stat. cap. 125, do not abate by the death of the debtor within three months after the publication of the notice of the warrant in the Gazette, nor by the debtor being declared bankrupt in England within that period. *Ex parte Archibald*, 2 *Han.* 30.

**13—Foreign Corporation.**

A foreign corporation having an agency and carrying on business in this Province may be proceeded against as an absent debtor under the 1 Rev. Stat. cap. 125. *Ex parte The Columbian Insurance Co.*, *Hil. T.* 1871.

**14—Jurat—Signature—Want of.**

The want of a signature to the jurat of the affidavit of the applying creditor upon which a warrant of attachment is issued under the Act 26 Geo.III, cap.18, is a fatal defect in the proceedings, and is not waived by an application for a supersedeas by the debtor. *Ex parte Nason*, *Easter T.* 1838.

**15—Insolvent Act of 1869—Effect.**

The Absconding Debtors Act, 1 Rev. Stat. cap. 126, is not repealed by "the Insolvent Act of 1869," their provisions not being necessarily inconsistent. The former Act applies to persons and cases not provided for by the latter Act. *Ex parte Reynolds*, 1 *Pug.* 176.

**16—Property acquired by debtor subsequently to appointment of trustees—Vesting of.**

Where proceedings have been taken against a person as an absconding debtor, and trustees have been appointed under 1 Rev. Stat. cap. 125, property acquired by the debtor after the appointment of the trustees, does not vest in them.—*Hannington v. Harshman*, 1 Pug. 217.

**17—Property in possession of debtor after issue of warrant—Evidence—Statements of debtor—Failure to prove fact when opportunity had.**

Proof that an Absconding Debtor had property subsequent to the issuing of a warrant against him, does not raise a presumption that he owned it at the time the warrant issued. The plaintiff should shew that debtor owned the goods before the issue of warrant. The statement of one of the trustees that he went to defendant and asked him for the property belonging to the estate and his reply was that the property had been placed in his hands by Boyden for his wife, and that he would give it to no one else,—*Held*, not sufficient evidence to leave to the jury of property in plaintiffs, and if the plaintiffs left it in doubt whether the goods belonged to Boyden at the time proceedings were taken against him, which doubt might have been removed by examination, the defendant was entitled to the benefit of the doubt.

*Cullen et al.*, Trustees of Boyden, an absconding debtor, v. *Voss*. 2 Pug. 464.

**18—Supervision of proceedings of Trustees.**

See Supreme Court in Equity 7. *Outhouse v. Hickman*.

**ABUTTAL.**

**Replevin—describing plan of taking by abuttals.**

See Pleading I. 34, *Mills v. Dewitt*.

**ACCEPTANCE.**

See Bills and Notes.

**Of Bill by Agent—Authority.**

See principal and agent 10. *McGhie v. Gilbert*.

**Per-procuration—Authority—Agency.**

See Bills and Notes II. 16.

**Protest—Evidence of Acceptance, &c.**

*See Bills and Notes III. 3. Tarrat v. Wilmot.*

**Acceptance of offer of logs.**

*See Contract 8, Polly v. Waterhouse.*

**Acceptors of Timber orders—Liability—Usage.**

*See Contract 2. Rankin v. Godard.*

**1—Proof.**

Action against drawers of foreign bill of exchange payable at so many days after sight, and averred to have been accepted, but afterwards protested for non-payment. -Quære, Whether proof of acceptance is necessary beyond the protest for non-payment? If not necessary in ordinary cases, whether it would be, where the acceptance purported to make the bill payable by third persons, and the protest for non-payment is made upon the presentment to such third persons only? *See Pollock v. Cunard, 2 Kerr, 291.*

**2—Statute of Frauds—Acceptance.**

A mere delivery of goods by the vendor without an actual acceptance by the vendee of some part thereof, is not sufficient, within the statute of frauds. The receipt of the goods by a common carrier from the vendor, without any specific direction or authority from the vendee, will not amount to an acceptance by the vendee, within the statute. *Daley v. Marks, Ber. 346.*

**ACCOMMODATION BILL.****Indorser receiving property consideration for promise to destroy bill.**

*See Bills, &c., V. 3. Watson v. Porter.*

**ACCOMPLICE.****Confession of third person to implicate.**

*See Criminal Law III. 1 Blair v. Hopkins.*

**ACCORD AND SATISFACTION.****1—Retention of Draft—Presumption.**

Plaintiffs, merchants in Boston, had sold goods to defendant in St. John, and he had made payments on account;

there was some dispute whether the price of the goods was to be paid in gold or American currency. On the 19th May, 1865, defendant sent the plaintiffs a gold draft for \$719, stating that he considered that it would balance the account between them. On the 19th May the plaintiffs acknowledged the receipt of the draft, but denied that it balanced the account, and stated that they would hold it subject to the defendant's order; and on the 23rd May he requested them to return the draft to him. They neither answered the letter nor returned the draft, but afterwards sold it in the money market, and claimed a balance. Held, That the draft being of an uncertain value, dependent on the price of gold in the United States, might be accepted as an award and satisfaction of the plaintiffs demand, and that by retaining and disposing of it after the defendant had requested them to return it, it might be presumed that they had accepted it in full. *Nash v. Derer*, 6 *Al.* 404.

**2.—Letter—Construction—When Ambiguous—Unliquidated demand—Satisfaction of.**

Disputes arising and existing about the management of a certain vessel, and complaints made, plaintiffs proposed by letter—"to end the matter if your brother will dispose of his quarter I will purchase it say for \$4,200 in cash"—defendants accepted the offer and the transfer was made to plaintiff on his paying the sum named. Held that the words "end the matter" referred to, and were predicated upon the previous causes of complaint, and that such were settled by the acceptance and carrying out of the terms proposed in plaintiffs' letter, and did not merely refer to the purchase of plaintiffs' share in the vessel; and that as to the grounds of complaint against defendants which were set out in declaration—being same as were contended to have been settled—and for which assumpsit was brought, there had been an accord and satisfaction.

*Weldon v. Vaughan*, 2 *P. & B.*, 70.

Amount paid in satisfaction of an unliquidated demand will not be enquired into. *ib.*

If language in letter is ambiguous it must be construed most strongly against the writer. *ib.*

**Attorney compromising suit—Unreasonableness of agreement—Consideration.**

*See* Attorney V. 7. *Bank of Nova Scotia v. Morrow.*

**Taking bill or note as satisfaction—A question for jury.**

*See* Evidence XII. *Dunn v. Fred. Brown & Co.*

**Settlement.**

*See* Contract 18. *Turner v. Keiver.*

**ACCOUNT.****Debits and credits—Use of one side.**

*See* Evidence XI. 18. *Palmer v. Gilbert.*

**General account included with bill of costs.**

*See* Attorney VIII. 4. *Kerr v. Burns.*

**Reference to Barrister to take account.**

*See* Sup. Court in Equity. 6. *Deveber v. Andrews.*

**Bill filed for account.**

*See* Equity. 1. *Botsford v. Hasen.*

**Barrister's Report.**

*See* Barrister's Report.

**ACCOUNT STATED.**

*See* Assumpsit III. a.

**ACCRETION.**

When an Island which has grown out of the water formed by alluvium, has a channel dividing it from the land adjacent, navigable for canoes at low water in summer, the proprietor of the adjacent land cannot claim the island as belonging to it by accretion. *Dunphy v. Williams*, 2 Pug. 350.

**Receding of low water mark—Extension of wharf—Covenant conditions binding assignee.**

*See* Covenant 7. *Mayor, &c., St. John v. Smith.*

**AC ETIAM.****No cause of action stated in ac etiam clause in writ.**

*See* Practice IV. 1. *Campbell v. Lowden.*

**ACKNOWLEDGMENT.****Acknowledgment by Admissions—Aquiescence.**

*See* Evidence I.

**Acknowledgment of Deed.**

*See deed.*

**Proof of Acknowledgment.**

*See deed.*

**Official Character of Person Taking.**

*See deed.*

**What a Sufficient Acknowledgment of Deed.**

*See deed.*

**1.—Promise to pay debt barred by bankruptcy.**

In an action to recover a debt from which the defendant had been discharged by the Bankrupt Act, the plaintiff relied upon the following promise to a creditor of the defendant since his bankruptcy: "I acknowledge that I owe B. (the plaintiff) and you, as soon as I am able I will pay you." Held: 1. That this was not such a distinct and unequivocal promise to pay the plaintiff as was necessary to entitle him to recover. 2. That the plaintiff should have declared specially on the conditional promise, and proved the defendant's ability to pay. *Blair v. Albee*, 8 All. 9.

**2.—Acknowledgment—No promise to pay.**

A mere acknowledgment of a debt by an administrator is not sufficient to take the case out of the Statute of Limitations; there must be an express promise to pay, and if there is more than one administrator, *semble* that the promise should be by all of them. *Gibbs v. Sewell*, Trin. T. 1833.

**—————When must be made to bar Statute of Limitations.**

*See Limitation of Actions II.*

**3.—Admission of Title—By verbal declarations.**

The verbal declaration of the grantee of land that he has sold it to a person under whom the defendant claims, is not sufficient to show title out of the grantee. *Doe v. Todd*, 2 All. 261.

**4.—By written agreement to buy.**

L. having been in possession of land upwards of twenty years, made a written agreement to buy it from the lessor of the plaintiff, but, before the time of payment, went away



leaving the defendant in possession, and stating that he could not pay for the land. *Held*, That this agreement was an admission of title in the lessor of the plaintiff, and that he might recover in ejectment without any other proof of title. *Doe v. Little*, 2 *All.* 558.

**5.—Acknowledgment of Title—Petition in Probate Court Statement—Statute of Limitations.**

A statement in a petition by defendant to the Probate Court, for letters of administration, that certain land in his possession belonged to the intestate, on which petition letters of administration were granted to the defendant, is a sufficient acknowledgment of title to the heir of the intestate to prevent the operation of the Statute of Limitations. —*Doe d. Spence v. Welling*, 6 *All.* 470.

**6.—Offer of Lease—Bidding at Sale.**

A verbal offer by a person in adverse possession of land to lease it from the owner, or bidding for the land at an auction of it by the owner, is not an acknowledgment of title, within the Statute of Limitations. *Doe v. Hasson*, 3 *All.* 451.

**7.—By Letter.**

In ejectment, the lessor of the plaintiff relied on the following letter as an admission of title by the defendant: "If you intend to sell the place, I want you to give me the first offer as soon as possible; write me an answer by the first opportunity; don't sell it to nobody till you let me know, and as to the money it shall be ready as soon as you give a good deed." *Held*, Not a sufficient acknowledgment of title in the lessor to be submitted to the consideration of the jury. *Doe v. Brown*, 8 *Kerr* 321.

**Statement in Petition.—Acknowledgment of Title.**

*See* Limitation of Actions II. 3.—*Doe d. Spence v. Welling*.

**ACTION AT LAW.**

- I. COMMENCEMENT OF ACTION.
- II. CONDITION PRECEDENT TO BRINGING ACTION.
- III. FORM OF ACTION.†
- IV. RIGHT OF IMMEDIATE ACTION.
- V. RIGHT TO DETERMINE CONTRACT.

- VI. SUSPENSION OF ACTION.
- VII. BEFORE EXPIRATION OF CREDIT.
- VIII. FORMER RECOVERY.
- IX. BY AND AGAINST WHOM MAINTAINABLE.
- X. FOR WHAT MAINTAINABLE.
- XI. NOTICE OF ACTION,  
(Parties entitled to—Service of.)
- XII. JOINDER OF ACTIONS.
- XIII. JOINDER OF PARTIES.

## I.

## COMMENCEMENT OF ACTION.

1—The issuing of writ, and not the filing of the declaration, is the commencement of an action. *Stiles v. Brewster*, 4 *All.* 414.

2—The day of the issuing a summary writ, and not the day of teste, is considered the commencement of the action. See *Stephenson v. McLellan*, 1 *All.* 19.

## 3—Time—Demand.

A reasonable time must elapse between demand of money held by stakeholder and commencement of suit.

Where the race for which money is deposited as a stake, has not been run, the stakeholder is entitled to retain the money till he has a opportunity of enquiring to whom it belongs; but he has no right to hold it beyond that time, because one of the parties to the race withholds his assent to the payment. The plaintiff deposited £100 with the defendant as a stakeholder, to abide the result of a race to be run on the 5th November between the horses of plaintiff and K.; the race was not decided, and on the 11th November the plaintiff demanded the money, which the defendant refused to pay, stating that K. claimed it as the winner of the race: an action for the money was brought on the 22nd November. Held, That a reasonable time had elapsed between the demand and the commencement of the suit, and that the defendant was liable. *Kinney v. Stubbs*, 4 *All.* 126.

## II.

## CONDITION PRECEDENT TO BRINGING ACTION.

In an agreement for the construction of a rail road, it was provided that all damages claimed by either party for

non-compliance with the contract, and all other matters in dispute between them, should be decided by arbitrators whose award should be final. *Held*, In an action for work done under the contract, that it was a condition precedent to bringing the action that the amount of damages should be ascertained by arbitration. *Myers v. St. Andrews Railway Co.*, 5 *All.* 577.

*Quere*—Whether, if defendant had prevented the arbitration, the plaintiff could not recover for work and labour? *Ibid.*

### III.

#### FORM OF ACTION.

1—Since the Act 21 Vic. c. 20, a declaration may be framed as in an action on the case, though the injury complained of is a trespass. *Brown v. Thompson*, 4 *All.* 228.

*Quere*—Whether, independent of the Act, such a declaration is not sufficient after verdict? *Ibid.*

#### 2—Against Sheriff.

Case, and not trespass, is the proper remedy against Sheriff for refusing to give a confined debtor the benefit of the gaol limits. See *Caldwell v. Winslow*, 2 *All.* 203.

See *Supra* 1. *Infra* 3.

#### — — — Against Attorney.

Declaration disclosing sufficient cause of action in assumpsit. See *Pleading* I. 60.

#### 3—Trespass—Distress for Rent.

The option granted by the Act 50 Geo. 3, cap. 21, sec. 7, to bring trespass, or case, is to be understood according to the subject matter of the grievance, and not the mere election of the party. See *Trespass* II. 22. *Rogers v. Buntin*.

#### 4—Trespass—Continuance of.

After a recovery in trespass, every continuance of the wrong, is a new trespass, the remedy for which is by action of trespass, and not case. *Wallace v. Milliken*, *Trin. T.* 1833.

### IV.

#### RIGHT OF IMMEDIATE ACTION.

#### Covenant—Action before eviction.

See *Covenant*, 12. *Good v. End*

**Master and Servant—entire contract—dismissal without cause.**

See Damages, I, 15.

1.—Where a party to a contract disables himself from performing it, the other party's right of action for the breach immediately attaches. *Gilbert v. Campbell*, 1 *Han.* 471.

2.—May recover for goods delivered under contract for work, where both parties have disabled themselves from performance. See *McAuley v. Geddes*, 4 *All.* 526.

## V.

### RIGHT TO DETERMINE CONTRACT.

**Deviation—Seaman's wages.**

See Justice of the Peace, II. 3.

Shipping Law.

## VI.

### SUSPENSION OF ACTION.

**Executors.**

Actions against Executors and Administrators for recovery of debts, not suspended for eighteen months. See *Executors and Administrators* I. 2.

**Agreement—Breach of—Private Account.**

See *Assumpsit* I. 1.

## VII.

### BEFORE EXPIRATION OF CREDIT.

**1—Breach of Agreement.**

When goods were delivered under an agreement to be paid for by endorsed notes payable in . . . days after delivery, the vendor recovered in assumpsit before the expiration of the time of credit for a breach of the agreement in not giving the said notes. *Brown v. Frink*, *Ber.* 863.

**2—Special Contract.**

Payment to be made after logs driven into boom. Verdict general on special and common counts. Plaintiff could not recover, as special averments had not been proved, and credit had not expired, and because estimate of damages had been based upon the contract. See *Campbell v. Todd*, 8 *Kerr* 171.

## VIII.

## FORMER RECOVERY.

**1—Failure in Proof—Items disallowed.**

Where in assumpsit for goods sold and delivered, the plaintiff has recovered the value of part of the goods contained in his bill of particulars, but not the whole, some of the items being disallowed by the jury, under the Judge's direction, as not proved; no new action can be maintained for such items. *Ramsay v. Hamilton*, 2 Kerr, 511.

*Quære*—Whether the plaintiff could in such a case expressly withdraw part of his demand from the consideration of the jury, in order to bring a new action therefor? *Ibid.*

**2—Payment.**

A party who has made payment in goods or money on account of articles sold and delivered, and who, in an action brought for the price of such articles, has failed to prove such payments, cannot afterwards maintain an action of *indebitatus assumpsit* against the vendor to recover back the money or the price of the goods. *Wilson v. Cameron*, 1 Kerr 542.

**3—Landlord and Tenant—Former adjudication.**

If a tenant defends an action for rent, and a reduction is made on the amount claimed on the ground that he has been evicted by the landlord from part of the premises, he cannot afterwards maintain trespass against the landlord for the same action which he relied on as an eviction in the former action. *Hourke v. McCullough*, 4 All. 861.

**Replevin—Evidence of former recovery in.**

See Evidence III. 17.

**4—Pleading—Judgment.**

The defendant pleaded that the contract declared on was made by him jointly with W., and that the plaintiff had before impleaded the defendant and W. for not performing the same promises, and issue being joined, the cause was referred to arbitration, the award to be entered as the verdict of a jury—that the arbitrators awarded in favor of the defendant and W., and that judgment was entered up thereon: Held, That the plea was not double, as the real

defence was that the matter had been already adjudicated upon, and the joint contract was only alleged as introductory thereto : Held, also for the like reason, that the matter was properly pleaded in bar and not in abatement. *Collins v. McDonnell*, 1 *All.* 250.

A judgment in favor of three joint contractors is a bar to a second action by the same plaintiff, against two of them for the same cause of action. *Ibid.*

**5—Withdrawal of items from particulars—Confession for remainder.**

In an action for goods sold and delivered, brought against a firm, part of the goods included in the plaintiff's particulars had not been accepted by the defendants, in consequence of one of the firm having absconded, and the partnership having been dissolved before the arrival of the goods ; the plaintiff withdrew the charges for these goods from the particulars, and the defendants gave a confession for the balance of the account. In a subsequent action for these goods, against two members of the firm, on an alleged sale to them since the former action, they set up as a defence, a recovery in the first action. Held, That there was no evidence of a former recovery. *Ames v. Carman*, *East T.* 1871.

**Judgment—Satisfaction for Wrong Done.**

See Trespass III. 5. *Lawton v. Adams*.

IX.

BY AND AGAINST WHOM MAINTAINABLE.

**1—Judgment Creditor. Not discharging Debtor.**

An action on the case will not lie against a judgment creditor for omitting to discharge his debtor from prison upon an equitable satisfaction of the debt, there having been no order for his discharge, and the creditor not being legally bound to discharge him. *McPhelim v. Weldon*, 5 *All.* 358.

2—Defendant arrested the plaintiff on a covenant for payment of a mortgage debt, and while he was in custody his equity of redemption in the mortgage was sold by the Sheriff under an execution issued on a judgment confessed

to the defendant as collateral security for the payment of the mortgage debt, and was purchased by and conveyed to the defendant by the Sheriff. Held, That as the arrest was legal, and the action of covenant was not legally determined, nor the debt actually paid, the defendant was not liable in an action for wrongfully continuing the plaintiff in prison after the purchase of the equity of redemption, though the mortgage debt might thereby in equity be extinguished. *Ibid.*

### **3—Tenants in common.**

A tenant in common is liable in assumpsit to his co-tenant when he sells more than his share of the common property with the consent of his co-tenant. *Shaw v. Grant*, Ber. 110.

—Whether any and what acts short of the destruction of joint property will enable one tenant in common to sustain trespass against his co-tenant. See *Wiggins v. White*, Ber. 97.

5—One tenant in common cannot recover in assumpsit against his co-tenant for the value of his share of common property unless a sale by the co-tenant be actually proved. *Doyle v. Taylor*, Ber. 201.

### **6—Parent.**

Father of illegitimate child, not liable to third persons for the expense of supporting such child, unless it has been incurred upon his authority, or he has contracted to pay for it. *Forrest v. McRae*, 2 Kerr 174.

### **7—Corporation. Chamberlain.**

Direction in Act to the collector of money assessed, to pay money collected over to the Chamberlain, the Chamberlain cannot sue the Collector. Action must be brought by Corporation. See *Corporation* 9.

### **8—Fence Viewer.**

A person employed by a fence viewer to repair a division fence under the Act 1 Wm. 4, c. 9, on failure of the occupier to make the repairs directed, may maintain an action against such occupier for the amount of such repairs. *Stevenson v. Stanton*, 2 Kerr 670.

**9—Public Agents.**

The defendants, under the Act 7 Wm. IV., cap. 28, whereby the General Sessions of the Peace for the County of York appointed a committee of management for the erection of a new gaol; and in that capacity contracted with the plaintiff, binding themselves and their successors as such, on behalf of the said county, and subscribing their names "a committee on behalf of the county." *Held*, That they were mere agents for the public, and not personally liable on the contract. *Blair v. Robinson*, 3 Kerr 487.

**Public Officer.**

*See* Public Officer.

**Barrister and Counsel.**

No legal remedy to recover remuneration for professional services. *See* Attorney.

**10—Sheriff not liable for neglecting to arrest on mesne process unless plaintiff has sustained damage.**

*See* Sheriff 11.

**11—Clerk of House of Assembly liable to person employed by him.**

*See* Assumpsit III. 43. *O'Brien v. Wetmore*.

**12—Joint Occupier of Land—Trespass.**

A person working a farm on shares, and occupying part of the house jointly with the owner of the farm, has not such a tenancy as to prevent the owner of the farm from maintaining trespass on the land. *See* Landlord and Tenant 7.

**13—Husband as Representative of Wife—Legacy.**

If a legacy is bequeathed to a married woman who dies before any act done by husband to reduce it into possession, he can only maintain an action for it as representative of his wife, though he may be beneficially entitled to it. *Collins v. Cahir*, 2 All. 108.

**Legacy—Payment to Executor—Discharge of Party.**

*See* Assumpsit III. 14.

**Constable—Certified fees.**

*See* Criminal Law.

**14—Payees of note—Delivery by one.**

Plaintiff and two other persons being payees of a note indorsed it generally, the others giving plaintiff authority to collect it: plaintiff put the note in the hands of an attorney to collect, who, without authority, compromised with



the maker. *Held*, That the agreement to collect the amount of the note having been made with the plaintiff, he could sue the attorney for negligence without joining the other payees. *Berry v. Hutchison, Mich. T. 1865, 6 All. 829.*

**15—Part Contractors—Rescission of Contract by—Action in name of all.**

When some of a number of joint contractors had settled with the defendant, undertaking to rescind their contract and to substitute a different one, against the consent of the other contractors, they may sue for a breach of the contract in the name of all the parties. *Palmer v. Long, Ber. 122.*

**16—Legatee—Termination of Trust.**

A legacy was bequeathed to the plaintiff to be paid to be paid to her father in trust for her, and to be put at interest by him for her use till she attained eighteen years of age and then the amount of principal and interest to be paid to her. The legacy not having been paid to her father—*Held*, That the trust was at an end when the plaintiff attained eighteen years of age, and that she had then a vested right, and could sue for the legacy. *Livingston v. Powell, Ber. 225.*

**17—Joint Deposit—Death of one party—Survivor's right**

A receipt of money deposited in a bank was given in the following words: "Received from P. C. and H. C., to be drawn by either of them, or the survivor, \$1400 for which we are accountable with interest, on receiving 15 days notice." P. C. sent the receipt to the bank and applied for the money, but the Manager not being satisfied that the person who applied had authority to receive the money, declined to pay it. P. C. died three days afterwards. *Held*, That on his death the right to receive the money vested in H. C., and that P. C.'s administrator could not recover it. *Condon v. Bank of B. North America, Trin. T. 1870.*

**18—Master and Servant—Contract work for other Party—Adoption of services—Waiver of tort.**

*See Assumpsit III. 15. Beardsley v. Copeland.*

**19—Pond Keeper—Not liable for loss of logs by storm.**  
*See Pond Keeper.*

**20—Contract in fraud of third parties.**

*Semble*—An action cannot be supported on a contract

made between two persons in fraud of third parties.  
*Sharp v. McKeen*, 2 Kerr 524.

**21—Parties not in statu quo.**

See Assumpsit III, 29. *Pingree v. Watson*.

**22—Obligees of bond payable to A or B, or either, cannot be sued in name of one unless the other is dead.**  
*Haven v. Drummond*, 4 All. 267

**23—Insurance—Loss to whom payable—Interest—Assignment of Policy.**

See Insurance.

**24—Married woman—Husband insane.**

The amount due from a boarder under such circumstances, vests in the woman as her separate property, and will not pass to the husband's representatives on his death.  
*Abell v. Light*, 1 Han. 97.

**25—Widow—Dower.**

A widow cannot maintain action at law for dower in land in which her husband had only an equity of redemption during coverture. See *Doe v. Estabrooks*, 4 All. 455.

**26—Surveyor of Lumber.**

Assumpsit lies by a surveyor of lumber to recover his fees against the first purchaser after the survey, under 1 Rev. Stat. cap. 96, sec. 10. *Ferguson v. Muirhead*, 6 All. 848.

**27—Overseers of Poor—Paupers brought into Parish.**

The overseers of the poor not having any corporate rights, cannot maintain an action against a person who brings paupers into the parish, who become chargeable thereon, such act being no injury to the overseers individually. *Gillespie v. Phillips*, 5 All. 221.

**28—Want of Interest.**

Conveyance by one of remainder men, devisees divesting himself of interest in the property, cannot sue for cause of action which arose after he had ceased to have any interest in the property. See *Will. 28, Knapp v. King*.

**29—Government Official—Liability.**

Defendant was one of the commissioners for the construction of the Intercolonial Railway, appointed by the Governor-General. Plaintiff had a contract with the commissioners to grade the station grounds at M, according to a certain plan and specification. While plaintiff was performing his contract, defendant directed him to fill up a cellar where he was working, and upon the railway

grounds, which required attending to at once, and was not included in plaintiff's contract. Plaintiff stated he would do the work if defendant would pay him, and defendant stated that he would, and told him to do the work immediately. On being applied to afterwards for the pay, defendant told plaintiff he would see the Engineer in charge and have the amount put in the estimates, to be paid by Government. The amount, however, not being paid, plaintiff sued defendant, personally, and was non-suited.

*Held*, On motion to set aside the non-suit, per Duff, J., that, as in the case of contracts with public agents, the presumption is that the public faith or the justice of the Crown is relied upon, and the work in question was done for the public, and defendant in ordering it done was acting within the scope of his authority as a railway commissioner, he did not incur any personal liability, and that the non suit was therefore right; but, per Fisher, J., that, as the contract was entirely verbal, it should have been left to the jury to determine, under the direction of the Judge as to the relationship of the parties, whether the defendant had personally contracted and agreed to pay for the work. *Sumner, Assignee, &c., v. Chandler*, 2 P. & B. 175.

**30—Action against Servant of Crown—Summary application to stay proceedings.**

Defendant was sued for trespass to land claimed to belong to plaintiff, but which had been taken and used for the Intercolonial Railway. Defendant was Superintendent for Government Railways, and an application was made for a stay of proceedings on an affidavit alleging that the alleged trespass was committed by him in the employ of the Government as such Superintendent, and not otherwise. Plaintiff, in answer, swore that the action was brought against the defendant for personally trespassing on his land, and denied that the land had been legally taken by the Government.

*Held*, per Allan C. J., and Fisher, and Wetmore, J. J., Weldon, J., diss., That the Court ought not on a summary application, to stay the proceedings, but should leave the defendant to resist the action by plea in the ordinary way. *Milner v. Brydges*, P. & B., 113.

**31—Tenant at will—Landlord.**

A tenant at will cannot maintain an action against his landlord for entering upon the premises and pulling down a chimney. Such an act merely amounting to a determination of the tenancy. *Brewing v. Berryman*, 2 *Pug.* 115.

**32—Committee of Lunatic's Estate—Matters relating to official duties.**

*Held*, by Weldon and Wetmore, J. J., (Duff. J. diss.), that a suit in equity cannot be brought against a committee of a lunatic's estate in respect of matters relating to the discharge of their official duties, without the leave of the court for that purpose first obtained, the committee being subject to the control and direction of the court; and where a suit was commenced without such leave, the bill was ordered to be taken off the files of the court. *Deveber v. Oulton*. *Oulton App't.*, and *Deveber Resp't.*, 2 *P. & B.*, 948.

**33—Licensee of Crown Land obstructing road not liable to trespasser on land.**

A trespasser on Crown Land cannot maintain an action against a licensee of the land for obstructing a road through it and preventing the plaintiff from hauling away timber illegally cut. *Leighton v. Bohan*, 6 *All.* 440.

**Breach and damage in lifetime of testator.**

See Covenant 13. *Beak v. Barlow*.

**Bailee—Loss of scow—No misfeasance shewn.**

See Bailee.

**Collector of Customs—Loss by accidental fire.**

See Action on case, I. 1. *Kirk v. Smith*.

**Corporation—Where no rector.**

See Trespass, I. 9. *Rector, &c., St. George's Church v. Cougle*.

**Constable—Liability.**

See Constable.

**Exchange of Goods—Subsequent account rendered—Promise.**

See Assumpsit III. 5. *Grant v. Aiken*.

**Infant—Ratification by.**

See Infant.

**Infant—Promise to pay note by, after coming of age.**

*See Bills, &c., II. 5. Fisher v. Jewett.*

**Licensee of Crown Lands—Against wrong doers.**

*See Action on Case I. Beckwith v. McPhelim.*

**Wrong doer against Crown Licensee.**

*See Supra. 88.*

**Master of ship—Loss by jettison.**

*See Carrier. Johnstone v. Crane.*

**Magistrate acting without jurisdiction.**

*See Trespass V. 2. Nary v. Owen.*

*See Justice of Peace, III.*

**Officer displaced without cause.**

*See Assumpsit III. 83. Joplin v. Davidson.*

**President of corporation—Salary.**

*See Corporation 27. Fellows v. Albert Mining Co.*

**Pawnee—Replevin for wrongful taking of goods pledged.**

*See Bailee.*

**Purchaser—Recovery of deposit money.**

*See Assumpsit III. 19. Scott v. Garnet.*

**Registrar—Medical Act.**

*See Action on the case, I. 3 Peterson v. Harding.*

**Remainderman—Right to maintain ejectment without demand of possession.**

*See Will 8. Doe d' Livingstone v. Corrie.*

**Rector—Party to maintain trespass, I. 8.**

*Rector, &c., of St. Stephen v. Turtelott.*

**Ship owner against insurer—Jettison—Contribution.**

*See Insurance 86. Marks v. Watson.*

**Seaman.**

*See Seaman's Wages.*

**Trustees' Absconding Debtor—Trover—Right to maintain.**

*See Absconding Debtor 3.*

**Wrong doer—Cutting timber.**

*See Trover II. 2. Kerr v. Connell.*

## X.

## FOR WHAT MAINTAINABLE.

## 1—Judgment in Magistrate's Court.

Courts of Justices of the Peace, established under the Act of 4 Wm. cap. 45, are not Courts of Record; and assumpsit may be maintained on a judgment recovered in such Court. *Young v. Woodcock*, 3 Kerr 554.

## 2—Foreign Judgment.

A foreign judgment is not a debt of record, but only evidence of a debt; and the simple contract on which it is founded is not merged in it. *Fergus v. Wardlaw*, 3 Kerr 665.

3—No action will lie in this country on a foreign judgment, if the defendants were not resident within the jurisdiction of the foreign Court, and had no property or agent there, and were neither served with process in the foreign country, nor defended the suit; though they were served in this country with notice of the pendency of the suit, and the judgment may have been obtained according to the practice of the foreign Court in similar cases. *Cyr v. Sanfacon*, 2 All. 641.

## Seduction.

See Seduction.

## 4—Serving Processes.

Under the Act of Assembly 6 Wm. 4, cap. 1, sec. 11, a person serving processes directed to the Sheriff, but without any authority from him, is precluded from maintaining any action for his services. *Herrington v. Lugrin*, 1 Kerr 109.

## 5—Salvage.

Where claim is simply for salvage services, and no question of apportionment arises, an action at law can be maintained, although where apportionment of the amount among several claimants is asked for, it is probably a matter exclusively within the jurisdiction of the Admiralty Court. *Copps et. al., v. Read et. al.*, 3 Pug. 527.

**6—Bastardy Bond — Overseers incurring liability—  
Money not actually paid.**

The condition of a bastardy bond was to indemnify the parish against all charges for or on account of the support of the child. The overseers of the poor having entered into a contract for the support of the child, and incurred a liability to the extent of \$16. *Held*, per Allen C. J., and Weldon, Fisher and Duff, J. J., that they could recover this amount, though they had not **actually paid** over this amount of money. *Regina v. Archibald*, 2 P. & B., 250.

**7—Injunction, obtaining order for, no allegation of  
misrepresentation of facts.**

The service of a copy of an order of injunction, even though alleged to have been made maliciously, whereby plaintiffs were prevented from selling certain property to the party served, affords no ground of action, unless there has been some misrepresentation of fact, and the person is misled by such misrepresentation, and acts upon it and thereby suffers damage. No action will lie for making a statement, the truth of which is not impugned. *Gordon et al. v. McGibbon et al.* 8 Pug. 49.

**8—County Court Judgment.**

An action may be brought in the supreme court on a judgment obtained in a County Court. *Baxter v. Curliss et al.* 2 P. & B., 86.

**9—Master of Ship.—Goods Jettisoned.**

An action for goods jettisoned will lie, although the master has signed clean bills of lading for them and should not have stowed them on deck. *See Shipping Law*. 16. *Cameron v. Domville*.

**Master's Wages — Vessel lost—Change of owners—  
Liability of owner.**

*See Shipping Law* 15. *Simpson v. Deveber*.

**Injuries to riparian rights.**

*See Riparian Proprietor.*

**Liability of execution creditor for loss of goods by sheriff.**

See Execution 20. *Millar v. Daniel*.

**Second action—Staying proceedings when vexatious or negligent.**

See Second Action.

**Constable for Services—Certified fees.**

See Criminal Law.

**Quantum Meruit—Contract rescinded by parties disabling themselves from performance.**

See Assumpsit III. 52. *McAuley v. Geddes* 4 All. 526.

**Fires—Negligently kindling.**

Action of debt to recover damages will not lie.

See Fires.

**Damages—Splitting up claim.**

Party cannot split up his claim for damages, and proceed for a part of the trespass at one time, and part at another.

See Trespass III. 5. *Lawton v. Adams*.

See Separate Titles of Actions.

## XI.

**NOTICE OF ACTION—PARTIES ENTITLED TO—SERVICE OF.****1—Police.**

The Police Act 11 Vic. cap. 18, sec. 23, enacted that in all actions to be commenced against any person for any thing done in pursuance of the Act, notice in writing of such action should be given to the defendant one month before the commencement of the action. Held, per Chipman, C. J., Carter, J. and Street, J., In an action brought for breaking open a house, that the defendants (one of whom was a policeman, and the other acting in his aid and under the orders of the Mayor) were entitled to notice; the policeman, because he acted in the *bona fide* belief that he was in the legal discharge of his duty, and the other defendant



because he acted *bona fide* in aid of the policeman and under the belief that he had authority to do the act complained of. *McNichol v. Gray*, 2 *All.* 78.

2—The Police Act 11 Vic. cap. 18, sec. 22, does not authorize the arrest without warrant, of known residents of the place; nor is a person who acts as a principal in directing a policeman to make an arrest, entitled to notice of action under that Act. *Foley v. Tucker*, 1 *Han.* 52.

3—Policeman—Belief, *bona fides* of—Submission of question to Jury—Counsel's duty—Decision by Judge.

In an action against a policeman, if it appears by the plaintiff's evidence, or it may reasonably be inferred from the facts, that he acted under a *bona fide* belief that he had authority by the Police Act 12 Vic. cap. 68, to do the act complained of, and therefore would be entitled to notice of action, the plaintiff's counsel should ask to have that question submitted to the jury, or the defendant's counsel may ask it: if neither counsel ask, and the question is not submitted, the Court may determine whether there is evidence to shew reasonable grounds of belief. *Harvey v. Marshall*, 6 *All.* 292.

4—Owner of Property—Dam overflowing.

Where the defendant became the owner of property with a dam on it which overflowed plaintiff's land, he was held to be entitled to notice before action brought. *Belyea v. Hamm*, 2 *Han.* 27.

5—Justice of Peace—Requisites of Notice.

A notice of action stated "that you, the said E. P. (defendant), on the 28rd December, 1868, at the Parish of K., and County of K., and on divers other days and times, etc., wrongfully and maliciously, and without any reasonable and probable cause, advised and encouraged one H. P. to bring an action in your Court, before you as a Justice of the Peace, against the plaintiff, in a matter of real estate, wherein the title of land was and did come in question, and wherein you had no jurisdiction as a Justice of the Peace, (setting out the proceedings and the award of judgment

against plaintiff,) and that you, the said (defendant) on the day and year last aforesaid, issued in the aforesaid case, wherein you had no jurisdiction, as aforesaid, an execution on the said judgment against the goods and chattels of the plaintiff, and caused his goods and chattels to be seized under such execution to satisfy the same." *Held*, That the issuing of the execution was a continuation of the previous proceedings in the suit; and, therefore, that the time and place of the issuing was stated with sufficient certainty in the notice. *Pickett v. Perkins*, 1 *Han.* 181.

5a—When special damage is claimed in consequence of an unlawful imprisonment by a Justice of the Peace, *e. g.* the cost of obtaining the plaintiff's discharge from prison, it should be stated in the notice of action, otherwise the plaintiff cannot give evidence of it. See *Sewell v. Olive*, 4 *All.* 394.

6—The trial of a civil suit by a Justice of the Peace is an official act, and he is entitled to notice under 1 *Rev. Stat.* cap. 129 before bringing an action against him for wrongfully proceeding in the suit. *Pickett v. Perkins*, 1 *Han.* 181.

#### 7—Justice of Peace—Reasonable grounds of belief.

Defendant, a Justice of the Peace, commenced a trial, but being required as a witness in the cause, another Justice took up the trial, during the examination; after which, the defendant resumed it, and during the latter stage of the trial, committed an assault on the plaintiff. *Held*, That though the defendant at the time he committed the assault was acting without jurisdiction, having no right to resume the trial under the *Rev. Stat.* cap. 137, sec. 28, still if he had reasonable grounds to believe that he had jurisdiction to do so, he was entitled to notice of action; and that this question should have been left to the jury. *Sumner v. McMonagle*, 6 *All.* 203.

#### 8—Justice of Peace—Second notice after discontinuance—First notice available—Requisites—Tender of amends—Time.

A notice of action for false imprisonment was served on defendant, a Justice of the Peace, on the 19th March, and

a writ issued on the 17th April. The plaintiff took out a rule to discontinue that suit, and got an appointment to tax the costs on the 9th July. On the 7th July, a second notice of action was served on the defendant, and a writ issued on Monday the 9th August. *Held*, 1st. That if the second notice was bad, the plaintiff could avail himself of the first notice, notwithstanding the discontinuance of the suit commenced thereon. 2nd. That the second notice was sufficient, though it did not allege that the defendant had acted maliciously,—he having acted, either entirely without jurisdiction, or in excess of his jurisdiction. 3rd. That though the last day of the month's notice expired on Sunday, the defendant had not the whole of the following day to tender amends; and therefore the action was not commenced too soon. *Hotch v. Taylor*, 1 *Pug.* 39.

#### **9—Constable.**

A constable appointed by the Sessions under the 1 Rev. Stat. cap. 56, and acting under the Justice's Act 1 Rev. Stat. cap. 137, is entitled to notice of action. *Robicheau v. Arsineau*, 6 *All.* 72.

**10** ——— A constable appointed by the Municipality in an incorporated County is not entitled to notice of action under 1 Rev. Stat. c. 56, in an action for false imprisonment under an execution issued by a Justice of the Peace. *Hunter v. Maddox*, *Trin. T.* 1865. See Act 31 Vic. cap. 19.

#### **11—Constable — False imprisonment — Railway Act—Limitation.**

The Act for the regulation of Railways, 21 Vic. cap. 18, authorized the appointment of constables within a certain district, and gave them all the powers and privileges incident to the office of Police constables by the Portland Police Act, 11 Vic. cap. 12. By section 40 of that Act, no action shall be brought against any person for anything done under the authority of the Act, unless it is commenced within three months. The defendant, a constable appointed under the Act 21 Vic. cap. 18, arrested the plaintiff on a charge of having committed a breach of the peace

within the district. *Held*, In an action for false imprisonment, that the defendant was entitled to the protection of the Act 11 Vic. cap. 12, sec. 40, and that the action must be brought within three months. *Boyce v. Pitfield*, 4 *All.* 443.

**12** ————A constable who executes a *capias* in a suit in which he is the plaintiff, is not entitled to notice of action before being sued for the arrest. *Condell v. Price*, 1 *Han.* 338.

### **13—Commissioners of Roads.**

By the Act 13 Vic. cap. 30, which authorizes the appointment (among others) of commissioners of roads, no action is to be brought against any person for anything done in pursuance of any of the provisions of that Act, without a month's notice. *Held*, That a commissioner of roads, not appointed under the 13 Vic. cap. 30, nor any Act thereby repealed, but acting under a previous Act, was not entitled to notice. *Basterach v. Atkinson*, 2 *All.* 439.

**14** ————The Act 13 Vic. cap. 4 directs the mode of laying out and altering roads, and the 13 Vic. cap. 30 authorizes (*inter alia*,) the appointment of commissioners of highways, and directs that no action shall be brought against any person for anything done under any of the provisions of that Act, without a month's notice. *Held*, In an action against a Commissioner of highways, for laying out a road through the plaintiff's land, that he was acting under the provisions of the Highway Act, (13 Vic. cap. 4,) and was therefore not entitled to notice of action. *West v. Atherton*, 2 *All.* 653.

### **15—Replevin—Constables.**

The action of replevin is not within the Act 13 Vic. cap. 30, sec. 15, which requires a month's notice before an action is brought against any person for anything done in pursuance of the Act. *Sterling v. Jones*, 2 *All.* 522.

### **16—Service of.**

A notice of action to a Justice of the Peace need not be served by the Attorney of the party who sues. See *Chilton v. Powell*, 1 *All.* 578.

**17** ————Any person to whom such a notice is given to serve, is the agent of the party for that purpose. *Ibid.*

**18—Place of abode of Plaintiff's Attorney.**

The name and place of abode of the plaintiff's Attorney need not be endorsed on the back of the notice : it is sufficient if it appears on any part of it. *Baxter v. Hallett, Trin. T. 1853. 5 All. 544.*

**19—Commencement of Action.**

In an action against a Justice, the plaintiff gave no evidence that the action was not commenced till the expiration of a month after the notice ; whereupon the Judge directed a nonsuit, to which the plaintiff did not submit, and obtained a verdict. On motion for a new trial, it appeared by the Nisi Prius record that the declaration was entitled more than a month after the notice. *Held, That this was prima facie evidence of the time of commencing the action, and that the non-suit was wrong, but that the plaintiff should have submitted to it ; therefore, a new trial was granted. Ibid.*

**20—Signature.**

In an action brought by husband and wife, for the imprisonment of the wife, the notice of action was signed " J. G. C., attorney for the said Priscilla Gabbles," (the wife.) *Held, Insufficient, and that it ought to have been signed on behalf of the husband. Gabbles v. Douglas, 6 All. 55.*

**21—Policeman—St. Stephen's Police Act—Reasonable ground—Jury.**

By the St. Stephen's Police Act, 27 Vic. cap. 55, sec. 1, policemen appointed under that Act were to have " all such powers, privileges and advantages," as any constable appointed by law has, or may have by virtue of the common law, or any Act of Assembly. Section 3 authorized any policeman on duty to arrest, " without warrant, any idle or disorderly person whom he shall have just cause to suspect of having committed or being about to commit any felony or misdemeanor."—Defendant, a policeman, arrested the plaintiff without a warrant, on information given by E. that the plaintiff had feloniously set fire to his barn.

In trespass for false imprisonment — *Held*, 1st. That policemen appointed under the Act were entitled to the benefit of the provisions respecting notice of action given to constables by 1 Rev. Stat. cap. 56. 2nd. That, in order to determine whether the defendant was entitled to notice of action, it should have been left to the jury to find whether the defendant, at the time of the arrest, honestly believed, and had reasonable ground for believing, that the plaintiff had committed a felony, for which he was liable to be arrested under the Act. *Murphy v. Eills*, 2 *Han.* 347.

**22—Notice of Action—Given by uncertificated Attorney.**

When the Attorney who gave a Justice of the Peace notice of action as required by Rev. Stat. cap. 129, sec. 8. (consol Stat. cap. 90 sec. 8) had not paid the Library fees under 22 Vic. cap. 28) (consol Stat cap. 34) at the time of giving the notice, but paid before the Writ in the cause was issued, the Court refused to set aside the proceedings. The name of an Attorney on the notice is sufficient as complying with the requirements of the Statute, if the person is an Attorney on the roll. The notice is not any proceeding in the Court. *Wetmore v. Harding*, 1 *P. & B.* 566.

**23—Attorney's Name on Notice. :**

It is sufficient if the Attorney's name appear in any part of the Notice. *McGilvery v. Gault*. 1 *P. & B.* 641.

**Notice given by an Attorney who has not taken out his certificate.**

*See* Action at Law (Notice.)

**24—Replevin—Fisheries Act 31 Vic. cap. 61.**

The Section of Act 31 Vic. cap. 61, sec 18, requiring Notice of Action does not apply to replevin. Nor can the want of notice be made available as a plea in any way. *McGowan v. Betts* 2 *Pug.* 90.

**25—Necessity of explicit Statement—Notice to Justice.**

A notice of action against a Justice must state the cause of action explicitly, and in a case where the Justice issued a void warrant, directing the constable to take the

plaintiff's goods and in default to take his body, under which the Constable arrested the plaintiff, although there were goods on which he might have levied, a notice alleging a joint trespass against the Justice and Constable was held defective in that it did not clearly set forth the Justice's liability. The notice should explicitly have stated what the Justice did and what the Constable did, so that the Justice might distinctly know what he was accused of doing under the warrant, and not mixed up generally with what the Constable did. *McGilvery v. Gault*, 1 P. & B. 641.

## XII.

### JOINDER OF ACTIONS.

Since the Act 21 Vic. cap. 20, sec. 5, the plaintiff may join in the same declaration, an action for trespass *quare Cl. fregit*, and slander; each of the counts being in the form of trespass. *Lipsett v. McLaggan*, 5 All. 509.

#### **Joinder of Courts.**

*See* Pleading IV.

#### **Declaration.**

*See* Supra III—also Pleading I.

## XIII.

### JOINDER OF PARTIES.

#### **1—Contract—Joint or Several—Ambiguity.**

Where the interests of a number of persons to a contract are distinct and separate, and a covenant made by them is not unmistakably joint, but ambiguous, they must be sued separately. Therefore where J. contracted with A. and eight other persons to raft separately and deliver at a certain place, lumber which belonged to them individually, for which the latter agreed to pay 65 cents per thousand; and it was also provided that if any of the parties failed to pay the amount owing by them when due, J. could sell sufficient of the lumber belonging to said party or parties, to

pay the amount due. *Held*, that this was a several contract on the part of A. and the other owners of the lumber, and that a joint action would not lie against them. The language of severalty, more than interest, ought to be relied on. *True and Stairs, v. Atherton et al* 8 *Pug.* 90.

**2—Action for proceeds of sale of Ship—Joint Owners—Necessity of Joinders of all as Plaintiffs.**

C. L. and G. the plaintiffs with S. J. G. were owners of the Schooner *Ada*. They all united in executing a certificate of sale to the defendant, under the provisions of the Merchant Shipping Act, under which the vessel was sold. The plaintiffs having brought an action against the defendant, without joining S. J. G. with them as plaintiffs, for their share of the proceeds of such sale, and of the outward freight, it was held that the contract with defendant was a joint contract, and that all the owners should be joined in the action against the defendant. *Campbell et al. v. Jones*, 1 *P. & B.* 656.

**3—Parties composing firm—Reasonable belief as to.**

Where plaintiffs had reasonable grounds for believing that the three defendants sued alone composed the firm, it was held sufficient to join them as defendants. See Pleading II. 55 *McDonald v. Cumming, et al.*

**4—Foreclosure Suit.**

Where debt secured by Mortgage on land belongs to one person, and the legal estate in the land is vested in another, both must be joined in suit for foreclosure. *Cotton v. Slack*, 3 *Pug.* 425.

**5—Equity Suit—Alienation Pending Suit.**

Where the plaintiff, pending a suit in equity, makes such an alienation of his property as to render the alienee a necessary party to the suit, he should apply to the court to have the latter made a party to the suit. *Semble*, The defendant when he becomes aware of the alienation might apply to the Court to stay proceedings until the proper parties are before the Court. *Frazer v. Dewitt. Dewitt*, Appellant, *Frazer*, Respondent, 2 *P. & B.* 738.



**Payees of Note—Agreement to Collect, made by one.**

*See* Action at Law IX, 14. *Berry & Hutchinson.*

**Parties entitled to bring Action—Separate Interests.**

*See* Agreement 12. *Neville v. Joseph.*

**Improper Joinder as Co-Plaintiff in Suit in Equity.**

*See* Practice in Equity 84, *Jones and wife v. Adkins et al.*

### ACTION ON THE CASE.

- I. BY AND AGAINST WHOM MAINTAINABLE. LIABILITY.
- II. NEGLIGENCE.
- III. NUISANCE.
- IV. OBSTRUCTIONS.

#### I.

BY AND AGAINST WHOM MAINTAINABLE—LIABILITY.

*See* Action at Law.

#### 1—Collector of Customs.—Accidental Fire.

The Collector of Her Majesty's Customs, who has, as such, the charge of the Queen's warehouse, is not liable to an owner of goods deposited therein for a loss to such goods by accidental fire, although he may have refused to open the warehouse and permit their removal during the fire; if in so refusing he has acted under a sense of duty for the general good, and not maliciously with intent to injure the plaintiff, or in a negligent, wanton, or arbitrary manner. *Kirk v. Smith*, 2 Kerr 187.

#### 2—Landlord and Tenant—Fire.

In an action by a landlord against his tenant for negligently allowing lime to get wet with the tide, in consequence of which the landlord's property was burned, the jury were directed that to render the defendant liable he must be guilty of gross negligence, and that being aware of the danger of getting the lime wet, he negligently stored it without taking ordinary care to protect it from the water; but that if he had taken such ordinary care, and it got wet

by an unusually high tide, he would not be liable. Held, that, taking it altogether, the direction was correct. *Upton v. Pingree*, 2 *All.* 186.

### 3—Registrar—Medical Act—Pleading.

By the Act 22 Vic. cap. 18, sec. 11, every person in the Province possessed of a medical degree or diploma to practice medicine or surgery, from any college in Great Britain, Ireland, Canada, France, or the United States, authorized to grant the same, shall, on payment, etc., be entitled to be registered under the Act, and by sec. 12, no qualification shall be entered on the register, unless the Registrar is satisfied by the proper evidence, that the person is entitled to it. Held, in an action against the Registrar for refusing to register the plaintiff. 1. That the defendant was not liable unless he acted maliciously; and that an averment in the declaration that he *wrongfully* and *injuriously* refused to register the plaintiff, was insufficient. 2. That the mere production of a diploma to the Registrar, was not sufficient evidence of the authority of the college to grant it: the declaration should have averred that proper evidence of the plaintiff's title to registry was tendered to the defendant. *Peterson v. Harding*, 4 *All.* 588.

Sec. 2 declared, that the Act should commence and take effect from the 1st June, 1859; and sec. 6 authorized the Governor to appoint a Registrar as soon as convenient "after the passing of the Act." The Governor's assent was given to the Act on the 12th April, 1859. *Semble*, that no appointment could be made under sec. 6 before the 1st June. *Ibid.*

### 4—Licensee of Crown Lands—Wrong Deed.

A licensee of crown land, with authority to cut and take away timber therefrom, may maintain an action on the case against a person who wrongfully cuts the timber, in consequence of which the licensee sustains damage. *Beckwith v. McPhelim*, 2 *All.* 501.

### 5—Sheriff—Reversionary interest of Plaintiff.

Plaintiff leased cattle to T. for ten years, at the end of

which time T. was to give up the cattle, *or others in their stead*, in as good condition as at the date of the lease. *Held*, That the plaintiff had no absolute reversionary interest in the cattle, and could not maintain an action on the case against the Sheriff for selling them under an execution against T. during the term. *Good v. Winslow*, 4 All 241.

**6—Judgment Creditor—Refusal to discharge Debtor—Equitable satisfaction—Action on the case not sustainable.**

*See* Action at Law IX. 1. *McPhelim v. Wilson*.

**7—Continuance of Trespass.**

An action on the case will not lie for the continuance of trespass; as every continuance of the injury is a new trespass. *Wallace v. Milliken*, *Trin. T.* 1833.

**8—Vendor—Vendee—Breach of Duty—Third Person.**

The defendant became the purchaser of a quantity of timber lying on the close of T. L., and agreed with him to remove the same by a certain day. T. L. sold and conveyed the land to the plaintiff, who called upon the defendant to remove the timber; and the same not having been removed at the time agreed on between T. L. and the defendant, the plaintiff proceeded to remove the same, and incurred expense in so doing, which he required the defendant to pay. *Held*, That no action could be maintained by the plaintiff against the defendant for any supposed breach of duty in not removing the timber; the only ground of action was on the contract, and did not vest in the plaintiff, so as to be enforced in his name by reason of his purchase of the land. *Rae v. Rankin*, 2 Kerr, 453.

**9—Tenants in Common—Waste—Damages.**

The saws, water wheel, and mill gear, fixed in a saw mill, and the cog-wheel of a grist-mill, the property of two or more tenants in common, are a part of the inheritance, the damaging or taking away of which, except with the intent to repair or replace them, is in nature of waste, for which one tenant will be answerable to his co-tenant. *Linton v. Wilson*, 1 Kerr, 228.

In an action on the case for waste, the damages are confined to the actual injury done to the premises. *Ibid.*

**10—Alleged neglect of Duty—Chief Engineer of Fire Department—Respondent Superior.**

The corporation of the city of St. John are by law authorized to establish a fire department, and to enact by-laws for its government and management. *Held*, That having done this it was an end of their responsibility, and that the chief engineer could not in case of a fire be considered the servant of the corporation; but as acting in a *quasi* independent character, and that, therefore, the maxim *respondeat superior* would not apply, and that the corporation were not liable for neglect of duty of the chief engineer; the corporation not standing in the relation of master to the defendant in the performance of his duties of chief engineer.

Under the authority of the legislature, the common council passed, *inter alia*, the following by-law: "That it shall be the duty of the chief engineers respectively whenever a fire shall break out in that part or district of the city for which they are severally appointed, to repair forthwith to or near the place where the same may be, and to take proper measures for arranging and placing the several engines and other fire apparatus in the most commanding and advantageous situations, and duly and effectively working the same. \* \* \* And the chief engineer of the district in which any fire shall break out shall have the chief direction of all proper measures for the extinguishing and prevention of the fire, and for the preservation of order and the observance of the provisions of the fire law and regulations, and the chief and absolute control and command over all the engineers and firemen, except in so far as relates to the immediate ordering and control of the firemen under the command of the chief engineer (being present at such fire), of the other part or district of the city."

A fire broke out in the plaintiff's property, to which the chief engineer declined to send an engine, there being

another fire raging in the city at the time, at which he was present, and which he considered it unsafe to leave. *Held*, in an action against the chief engineer that he had a right to exercise his judgment as to sending an engine to the plaintiff's property, and that having acted *bona fide* and to the best of his judgment in the matter he was not liable *Harris v. Marter, et al*, 2 *Pug.* 165.

**Declaration—Form of—Trespass or case.**

*See* Action at Law, III.

**Necessary Allegation of facts.**

*See* Pleading I. 75 *Gordon v. City of St. John.*

**Grantee—Right to make Water course.**

*See* Deed V. 8, *McKendrick v. Purdan.*

**Sheriff—Not making arrest.**

*See* Sheriff, 11. *Curran v. Beckwith.*

**Preventing Sheriff from executing writ of restitution.**

*See* Landlord and Tenant, VII. 5. *Allenach v. Desbris* i

**Misfeasance—Want of Evidence of.**

*See* Bailment.

**Obstructing road—Plaintiff illegally cutting Timber--  
Licensee of Crown not liable for obstruction.**

*See* Action at Law IX. 33.

## II.

### NEGLIGENCE.

**1—Injuring Nets—Done negligently or not.**

In an action for injuring the plaintiff's net with a raft which the defendant was navigating down the river M., the declaration stated that in consequence of the defendant's carelessness and mismanagement, the raft struck against and damaged the plaintiff's net. Plea—not guilty. *Held* That the only question for the jury was, whether the act

complained of was caused by the negligence of the defendant; not whether it was done wantonly or maliciously. *Wolhaupter v. Foley*, 4 All. 90.

In the progress of the raft down the river, it became bent, which rendered it more difficult to manage. *Held* That though the defendant being only a carrier, might not be liable for the improper construction of the raft, he was bound to use that care in the management of it, which its malformation rendered necessary to avoid injury, and that the jury were properly directed to consider whether he had done so. *Ibid*.

### **2—Allegation—Injury—Caused by negligence.**

In an action for injuring nets set in a public river, by running into them with a raft, it is sufficient to allege in the declaration that the injury was caused by the negligence of the defendant in navigating the raft. *Wolhaupter v. Foley*, 4 All. 167.

### **3—Surgical Practice—Gist of Action—Negligence—Intent immaterial—Pleading—Proof.**

The declaration in an action against a surgeon for negligence, stated that the defendant, *wrongfully intending to injure the plaintiff*, did not use proper care, etc. *Held*, That negligence being the gist of the action the defendant's intent was immaterial, and the averment of the wrongful intent need not be proved. Also—That evidence offered by the defendant to disprove his wrongful intent was not admissible. *Kelly v. Dow*, 4 All. 485.

### **Evidence of Negligence in Surgeon.**

*See Evidence*, III. 10, 11.

### **4—Towing Vessel—Collision—Indemnity—Presumptive knowledge of unlawful act—Ratification—Implied liability of principal—Damages.**

*See Principal and Agent*, 16. *Leavit v. Parks*.

### **Facts—Necessity of Alleging.**

*See Pleading*, I. 75. *Gordon v. City of St. John*.

## III.

## NUISANCE.

**1—Erection of Dam—Overflowing land.**

A., the owner of land, through which a river flows, is entitled to recover damages in an action on the case from B., the owner of the land adjoining, situate lower down the stream, for erecting a mill dam upon his own land, which caused the water to flow back upon A.'s land. *Smith v. Scott*, 1 Kerr 1.

The circumstance of A.'s being present while the work was going on, and himself assisting as a labourer in the employ of B., is not conclusive evidence of a license so as to estop A. from maintaining such action; but is for the consideration of the jury, in connection with the other circumstances of the case, particularly such as tend to shew that A. could not have been aware of the effect of the dam. The extent of the license, if any, was also a question for the jury. *Ibid.*

*Quere.*—Whether a license in such a case could be inferred? *Ibid.*

**2—Erection of Dam—Mortgagor and Mortgagee.**

A mortgagee of land through which a stream flows, is not liable for an injury caused by a mill dam erected by the mortgagor in possession, though the money for which the mortgage was given, was lent by the mortgagee for the purpose of building the dam. *McNaughton v. Fraser*, 3 All. 247.

**3—Erecting Dam—Question left to jury as to erection—Continuance and Injury.**

In an action for overflowing land, the plaintiff alleged the injury to have been done by the defendant's raising a mill-dam, and thereby overflowing more land than the dam originally did. It appeared, on cross-examination of one of the defendant's witnesses, that he had worked the mill for a longer time during the summer than the former owner

did. The jury were directed, that if, by the original dam, and the way it was used, the land was overflowed only in a particular manner and at particular seasons, and the defendant had within twenty years used the dam differently, and overflowed the land in a different manner, and at different seasons of the year, the plaintiff should recover. The jury having found for the defendant—*Held*, That the direction was right. *Lawlor v. Potter*, 1 *Han.* 828.

#### 4—Damages—Limitation of Action.

In an action on the case for nuisance in overflowing the plaintiff's land by a dam, which was erected by the defendant more than six years before bringing the action—*Held*, That the effect of a plea of the statute of limitations was not to bar the action, but only to limit the recovery of damages to the last six years. *Connors v. McLaggan*, 2 *Kerr* 446.

The jury were recommended, but not positively directed by the Judge, at the trial, to confine the damages to six years; but the Court refused to grant a new trial on this ground, there being evidence of actual damage during the last six years to the extent of the verdict, and no objection being made at the time to the Judge's charge, or any reason to think that the jury had exceeded the true estimate. *Ibid.*

The plaintiff was in possession of the land in 1830 when the dam was erected, but the grant of the Crown did not actually issue until 1838. *Held*, That the recovery of damages was not necessarily confined to the date of the grant, although such grant was put in evidence by the plaintiff; the grant might be deemed confirmatory of his possession. *Ibid.*

#### 5—Erection of Steam Mill—Evidence—Damage—Surplusage.

In an action on the case for a nuisance in erecting a steam mill on land adjacent to the plaintiff's dwelling house, the evidence of persons living in other adjoining



premises as to the injurious effect of the steam mill upon them, is admissible, in order to shew by necessary inference, the damage done to the plaintiff by the erection. No other damage need be shewn than the abridgement of the plaintiff's enjoyment in the occupation of his premises. The judgment will not be arrested because in one or more of the counts annoyance to the plaintiff's tenants, as well as to himself and family, is alleged: it will be deemed a surplusage. *Barlow v. Kinnear*, 2 Kerr 94.

**6—Repairs—not keeping—Consequential damage—Semble.**

If injury to plaintiffs property was caused by the negligence of defendants in not keeping a dam in repair, the plaintiffs might recover the consequential damages in an action on the case. *See Philips v. St. John Water Co.* 4 All. 24.

#### IV.

##### OBSTRUCTIONS.

##### 1—River Driving.

*Held*, that Barnaby's River (a branch of the s. w. river Miramichi), which extends about twenty-eight miles into the country, and had been long used for the navigation of boats and canoes, and for floating down logs and timber, was a common highway above where the tide flowed, and that the plaintiff's might maintain an action against the defendant for obstructing them in the driving down timber, by the erection of a pier and boom in the river, though the river, there, was within the defendant's grant: Such rivers may be private property, and yet subject to public rights. It is not necessary to shew an actual pecuniary loss or damage in order to maintain such an action, but if the plaintiff be obstructed while actually using the navigation, it is sufficient. *Esson v. McMaster*, 1 Kerr 501.

2 ——— All rivers above the flow of the tide, which may be used for the transportation of property, as for floating rafts and driving timber and logs—and not merely such

as will bear boats for the accommodation of travellers—are highways by water, and subject to the public use; and in determining whether a river is public or private, its length and depth at ordinary times, and its capacity for floating rafts, etc., are proper to be considered. *Rowe v. Titus*, 1 *All.* 326.

In an action for obstructing a river by erecting a mill dam, it is not a proper question for the jury, whether the benefit derived by the public from the mill, is sufficient to outweigh the inconvenience occasioned by the dam. *Ibid.*

### 2—Wharf—approach to.

A person in possession of a wharf, built without authority below low water mark in a public navigable river, cannot maintain an action on the case against the owner of a vessel for obstructing the approach to the wharf by occupying the stream in front (but not touching the wharf), in the ordinary course of navigation. *Eagles v. Merritt*, 2 *All.* 550.

*Quere*—If the vessel had lain an unreasonable time in front of the wharf, or there had been a malicious intent to injure the plaintiff in his occupation, whether the action would lie? *Ibid.*

*Semble*.—That a person in possession of such a wharf might maintain trespass for a direct injury to it, or an action on a contract for the use and occupation of it. *Ibid.*

### 4—Lights.

The plaintiff being the lessee of land on which there were two houses, assigned the lease to the defendant, excepting one of the houses during the remainder of the term. *Held*, That the defendant was liable to an action for obstructing windows existing in the plaintiff's house at the time of the assignment, though only recently constructed—the exception being construed as a grant by the defendant, from which he could not derogate. *Longmaid v. McNichol*, 3 *All.* 497.

**Obstruction to light and air—Presumption of grant—Question for judge, not jury—Damages.**

*See Evidence, VI. Ring v. Pugsley.*

**5—Running stream — Right of mill owner to use the water.**

In an action on the case for obstructing the flow of water to plaintiff's mills, the facts proved and admitted on the trial were, that plaintiff's land was granted in 1835 and mills had been erected on a stream there upwards of thirty years ago. He purchased in 1869 and repaired the mill. Defendant owned land further up the stream and built a mill and dam in 1874, and at certain seasons when gates of defendant's dam were closed for the purpose of raising a head of water to work his mill, sufficient water did not flow down the stream to enable the plaintiff to work his mill. It was admitted, defendant—if he had a right to stop the water and use it for the purposes of his mill—did not detain it for an unreasonable time. *Held*, Per Allen, C. J., Fisher and Wetmore, J. J. (Weldon J., dissenting) that defendant had the right to detain the water as he had done, and the verdict was, pursuant to leave reserved at the trial, entered in his favor. *Keith v. Corey*, 1 P. & B., 400.

**Alley Way.**

*See Deed, V. 4. Leary v. Armstrong.*

**Erection of dam in public stream — Injunction to restrain persons not obstructed from destroying dam.**

*See Water course.*

**Fishery—Erection of Weir.**

*See Fishery. "Crown Grant." Hierlihy. v. Loggie.*

**Navigation—Erection of Booms.**

*See Boom Co.*

**Way—Obstructing right of—Carriage and foot way distinguished.**

*See New Trial, II. 51. McRoberts v. McBride.*

**Right of Corporation to remove Obstruction—Jus Publicum.**

*See Crown Grant, II. 8.*

**Illegally cutting timber—Crown Licensee Obstructing road—Not liable for Obstruction.**

*See Action Law, IX. 88.*

**ACTS OF PROVINCIAL LEGISLATURE.**

*See British N. A. Act.*

**ACQUIESCENCE.**

**1—Intoxicated Party executing Deed.**

Where a deed executed by a party incapable of contracting as the result of intoxication, might be avoided by reason of the inadequacy of consideration, and the grantor was at times sober and capable of managing his business, he must have been fully informed of his right, and capable of acting on his own behalf in order that his not repudiating the deed during his lucid intervals shall amount to acquiescence in it. *Jones and wife v. Calkin et al.* 8 Pug. 356.

**2—Contract—Variance in—Defendant conduct—Evidence of Assent.**

*See Assumpsit, III. 42. Foshay v. Baxter.*

**3—Judgment debtor, in sale of land.**

The acquiescence of the judgment debtor in a Sheriff's sale and subsequent possession of the land by the purchaser short of twenty years, though presumptive evidence that all the necessary proceedings have been taken, will not give a title to the purchaser by estoppel. *Doe dem Hazen v. Hazen*, 8 All. 87.

**4**———The plaintiff claimed fifty acres of land under a deed in fee from his father J. B. in 1822, of a tract of four hundred acres, of which the fifty acres were part, which deed was subject to a condition that J. B. should receive and

enjoy all the profits and emoluments accruing from the land during his life. J. B., in order to pay a debt, about two years after the conveyance to the plaintiff, and with his consent, caused the fifty acres to be sold by the Sheriff; the plaintiff bid at the sale, and afterwards agreed with the purchaser upon a division line between that and the remainder of the land. There was no proof of any judgment or execution against J. B., or of any advertisement by the Sheriff under which the land was sold. *Held*, That if the plaintiff had a present estate in the land at the time of the Sheriff's sale, his acquiescence in such sale would not divest him of his estate. *Doe v. Baxter*, 8 All. 232.

**5—Plaintiff working under defendant's claim of right.**

*See* Railway Company.

**6—Boundary lines—Conditional assent to running.**

*See* Crown Grant, II.

**7—Presence of plaintiff at erection of dam.**

*See* Action on the Case, III. 1. *Smith v. Scott*.

**ACQUITTAL.**

**Of part defendants—Entry of Judgment.**

*See* Costs, VI. 97. *McLaughlan v. Wilson*.

**Costs—Depriving Acquitted Defendant of—Application—Time of.**

*See* Costs, I. 17.

**Allocatur—Allowance of—To acquitted defendant.**

*See* Costs, VI. 98.

**ADJORNMENT.**

**Of Proceedings—Power of one Judge.**

*See* Justice of Peace, IV. 3.

**ADJUSTMENT.**

*See* Pleading II., 4. *McLean v. Phoenix Ins. Co.*

**ADMINISTRATION.**

*See* Executors, &c.

**ADMINISTRATION BOND.**

*See* Bond D.

**ADMINISTRATORS.**

*See* Executors, &c.

**ADMIRALTY.****1—Jurisdiction.**

On motion for a prohibition to the Court of Vice-Admiralty. *Held*, That that Court has jurisdiction under the Statute 8 Geo. I, cap. 12, and 2 Geo. II, cap. 85, to entertain a suit *in rem*, instituted by the Crown against pine timber seized as cut on Crown Land without license, and to proceed to adjudge the forfeiture and condemnation thereof, although there has been no prosecution for the pecuniary penalties imposed by the said Acts on persons cutting or carrying away the same. A prohibition was accordingly refused. *The Queen v. 162 pieces of timber*, *Bar.* 410.

**2—Proceedings—Proper judge of.**

When a prosecution is carried on in the Court of Vice Admiralty, that Court is the proper judge of the mode of proceeding applicable to the case, it being a matter of practice which, if irregular, may be corrected upon appeal, but is not a ground for prohibition, especially after judgment has been given. *Regina v. Beveridge*, 1 *Kerr* 58.

**3—Salvage.**

*See* Action at Law, X. 5.

**ADMISSIONS.**

*See* Evidence, I.

**ADVANCEMENT.**

*See* Heir at Law.

**ADVERSE POSSESSION.**

*See* Limitation of Actions.

**ADVERTISEMENT.**

**1—Sheriff's Sale—Number of lot left blank—Sale not in validated.**

*See* Sheriff's Sale. *Doe v. Hasen.*

**2—Places of Advertising.**

*See do.* *Kerr v. Jamieson.*

**3—Executor's deed—Affidavit—Evidence of Advertisement.**

*See* Evidence IV. 2—3. *Doe v. Donovan.* *Doe v. Thompson.*

**4—Sale of Land—Posting Notices.**

*See* License. *Doe v. Tierney.*

Publication in weekly newspapers for three days cannot be made as notice for three days. *See* Election Law. *Herbert v. Harrington.*

**5—Order for Service by publication in Gazette—Time for appearance.**

Where a writ of attachment cannot be served personally, and an order is made for service by publication in Gazette for one week, the meaning is, that a week's publicity of the proceedings should be given to enable the defendant to appear, and that during the week he had a right to appear, and that the terms of order were not satisfied as soon as one publication took place, and that on the same day the order was made. *Colwell v. Robertson*, 1 P. & B. 481.

**AFFIDAVIT.**

I. AUTHORITY TO TAKE.

BEFORE WHOM SWORN.

II. INTITLING.

III. IN PARTICULAR CASES.

IV. PARTICULAR PERSONS.

V. JURAT.

VI. MISCELLANEOUS.

## I.

## AUTHORITY TO TAKE—BEFORE WHOM SWORN.

**1.—British Consul.**

An affidavit made in a foreign country, and duly authenticated by the certificate of a British Consul, is sufficient to authorize a Judge to make an order for bail. *Drake v. Wentworth*, Hil. T. 1894. See Acts 19 Vic. cap. 41, sec. 7, and 27 Vic. cap. 40, sec. 7.

**2—Attorney of petitioning Creditor.**

Affidavit, upon which a warrant under Absconding Debtors Act is issued, may be sworn before the Attorney of petitioning creditor. *Regina v. Steadman*, 1 Han. 869. †

**3—Judge—Nova Scotia.]**

An affidavit sworn before a Judge of the Supreme Court of Nova Scotia, whose signature is verified by an affidavit made in this Province, may be read in this Court. *Kirk v. Ansley*, 1 Kerr 801.

**4—Verification of Signature.**

Affidavit of due execution of Power of Attorney to demand costs made in Nova Scotia before a Judge there. Verification of his signature necessary by affidavit made here. See *Fraser v. Harding*, 2 Kerr 290.

**5—Commissioner of Supreme Court—Proceedings in other Courts.**

A commissioner authorized to take affidavits to be read in the Supreme Court has no authority to take an affidavit of the service of an order for review of the proceedings on a trial before a Justice of the Peace. See *Regina v. McIntosh*, 1 Han. 872.

**6—Commissioner, Court of Bankruptcy—England.**

An affidavit sworn in England before a Commissioner of the Court of Bankruptcy, describing himself to be a Judge of the Court, and purporting by the jurat to be a Court of Justice, and to be under the seal of such Court, may be used in this province under the Act 19 Vic. cap. 41, sec. 7. *Crane v. Casenove*, 4 All. 578.



**7—Affidavit of Service of Summons before Sessions.**

A Commissioner has no power to take the affidavit. *The Queen v. Golding*. 2 *Pug.* 385.

**Attachment Act.**

Where an attachment issues with the writ in the cause the affidavit may be sworn before the attorney who issues the writ. *Davidson v. O'Connell, et al* 3 *Pug.* 684.

The affidavit in such case should not be entitled in the cause, though if so, it may be treated as surplusage. *Ib.*

**8—Information—Not Criminal—Justices.**

In an action for slander for stating that the plaintiff had sworn falsely, it appeared that the proceedings in which the alleged false swearing was done, were before two Justices, on an information for *unlawfully* killing cattle. *Held*, That this being a mere trespass, the Justices had no jurisdiction to administer an oath. *Ganong v. Fawcett*, 2 *Pug.* 129.

**9—Portland Civil Court—Affidavit for Capias.**

An affidavit of debt for a *capias* to be issued out of the Town of Portland Civil Court, may be sworn before a Commissioner for taking affidavits to be read in the Supreme Court. *Waterbury v. Nixon*, 2. *P. & B.* 373.

**II.****INTITLING.****1—One of two Defendants.**

In an application by one of two defendants for relief under Insolvent Act, 1 Wm. IV, cap. 48, the affidavit was intitled in the name only of one of the defendants, the applicant. *Held*, The intitling was sufficient. *Wilmot v. Cornwell*, *Ber.* 31.

**2—No Cause in Court.**

Where an application was made under the Act of Assembly 6 Wm. IV, cap. 11, ss. 11, 12, by a Sheriff against

an Attorney, to compel him to pay the Sheriff's fees in certain suits in which the writs had not been served by the Sheriff, and the affidavits were entitled in the name of the Sheriff against the Attorney by name. *Held*, That the affidavits were improperly entitled, there being no such cause in Court. *Drury v. Howe*, 3 *Kerr* 588.

3 ——— Affidavits used in moving for a rule *nisi* for a mandamus are irregular if entitled in a cause, but the rule will be discharged without costs. *Regina v. Justices of York* 1 *All.* 90.

#### 4—Variance in description of Plaintiffs.

Where the title of a cause described the plaintiffs as "trustees for all the creditors of the estate and effects" of an absconding debtor, and the affidavits served on the plaintiff with a view to the discharge of bail, in their titles described the plaintiffs as "trustees for all the creditors, etc." omitting the words "of the estate and effects," held sufficient. *Allison and others, trustees v. Robinson*, 2 *Han.* 161.

#### 5—Several Causes—Same rule moved for.

Where the same rule is to be moved for in several causes, the motion may be moved for on a single affidavit, entitled in all the causes. *Brown v. Trenholm*, 2 *All.* 515.

#### 6—Abbreviations.

The abbreviations "Pltff" and "Deft" in the entitling of an affidavit are bad, and a rule obtained on such an affidavit will be discharged. *Raymond v. Caldwell*, 6 *All.* 36.

7 ——— An affidavit entitled thus, "plff" when made in the province is bad, and cannot be read. *Bank of Nova Scotia v. Morrow*, 1 *P. & B.* 344.

8 ——— An affidavit may be read, though not entitled in the Court, if it appear to be sworn before a Commissioner, Supreme Court. *Kerr, ex parte*, 2 *Pug.* 62. *Cotter v. Brownell*, 1 *Pug.* 356.

9———An affidavit entitled “In the matter of an election.” *Held*, mere surplusage, per Allen, C. J. *Keefe, ex parte*, 1 P. & B. 5.

10———An affidavit used on the part of the defendant in moving for costs of the day, being entitled “*Stack ats. Richard P. Cotton and Eliza P. Cotton, his wife*,” not allowed to be read. *Cotton v. Stack*, 2 *Pug.* 431.

11—Garnishee process—Affidavit to set aside—Entitling in cause.

*See Attachment 46. Whittemore v. Herbert,*

### III.

#### IN PARTICULAR CASES.

##### 1—By Sureties on Limit Bond.

Both sureties on limit bond should join in application for relief on equitable grounds, and collusion with principal denied by both. *See Goodwin v. Murray*, 3 *All.* 595.

2———Should state that application is made at the expense of bail, and without collusion. *See Bradford v. Fenton*, 3 *All.* 407.

##### 3—To hold to bail—Interest Money.

An affidavit of debt, stating the defendant to be indebted in £100 for principal money paid and advanced by the plaintiff for the defendant, “and in £50 for interest upon the said principal sum,” is bad as to the interest: but the causes of action being separate, the arrest will stand for the amount properly sworn to. *Simonds v. Simonds*, 2 *All.* 468.

##### 4—To set aside Judgment.

An affidavit to set aside a regular judgment and let a party in to defend, must give a clear statement of merits. *Rippey v. Austin*, 4 *All.* 77.

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**Where there are several defendants.**

*Quære.*

Whether all should join in the affidavit of merit? Where two out of three defendants made affidavits, and only one swore to merits—*Held*, insufficient. *Ib.*

**5—To set aside arrest—Certainty as to name.**

On an application to discharge a defendant, arrested by the name of John Henry Oviatt, his affidavit stated that his “name is John Hilder Oviatt.” *Held*, insufficient. An affidavit in such a case should be as certain as a plea in abatement for misnomer. *Thompson v. Oviatt*, 2 *All.* 118.

**6—Security for Costs.**

A demand of particulars is not such a step in the cause as to require defendant applying for security for costs to state in his affidavit that when he demanded particulars he was not aware of the plaintiff’s residence abroad. *Johnston v. Glazier*, *C. Ms.* 141.

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**Attachment for non-payment of costs—affidavit should state the place where demand was made.**

*See* Attachment 19. *Regina v. Delaney.*

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**Should also state the time when made.**

*See* Attachment 20. *Campbell v. Todd.*

**7—Attachment Act—Necessity of stating when cause of action accrued—Words of statute—Several partners—Affidavit by one.**

In issuing an attachment under the Act 37 Vic., cap. 7, it is unnecessary that the affidavit on which the attachment issues, should shew that the cause of action accrued after the passing of the act. (*See* now Consol. Stat. cap. 42.)

It is not necessary that plaintiff should swear that he is “apprehensive” of losing his debt, but he may use equivalent words.

Where several partners are plaintiffs. An affidavit for attachment made by one is sufficient. *Golding v. Waterhouse*, 3 Pug. 818.

**8—Initials of Name.**

Plaintiff must in his affidavit for attachment in an action on a note set forth one of defendants christian names, or allege that he signed the note by his initials. *McLellan v. Milmore*, 1 P. & B. 291.

**9—Statement of cause of Action—Particulars.**

Where an affidavit for an attachment under the Act 37 Vic., cap. 7, stated that defendant was indebted to plaintiff in a certain sum upon a contract bearing date &c., whereby plaintiff agreed to repair a building for defendant, and for extra work upon the said building, it was held that the affidavit was defective in not stating that the extra work was done at defendant's request; and as it did not appear how much was claimed under the contract, and how much for the extra work, the attachment was set aside.

The Court will not refer to the particulars to help out a defective affidavit. *Mitchell v. McMichael*, 1 P. & B. 58.

**10—Cause and Nature of Action should be set out—Bill of Exchange—Endorser.**

Plaintiff issued an attachment under "The Attachment and Abolition of Imprisonment for Debt Act," against defendant, as endorser of a bill of exchange; but the affidavit on which the attachment issued did not allege presentment and notice of dishonour to defendant. *Held*, on motion to set aside attachment that the affidavit did not disclose a cause of action, and was therefore insufficient. *Nicholson v. Nowlin*, 3 Pug. 210.

**11—Residence of Defendant—Misdescription—Setting out dates in figures.**

In an affidavit for an attachment, the defendant was described as of the parish of Lincoln, whereas he really lived in the parish of Burton. The dates of the notes for the amount of which the attachment issued were stated in

figures. *Held*, that neither the misdescription of the residence nor the statement in figures, instead of words at length, afforded sufficient grounds for setting aside the attachment. *Gray v. Alcorn*, 1 P. & B. 555.

### 12—Sufficiency of Affidavit.

In an affidavit for attachment for a certain sum of money for goods sold and delivered, money lent, and on an account stated, it is not necessary to distinguish how much is due on each account.

An affidavit for attachment set out several causes of action, and the plaintiff stated that no agreement had been entered into, whereby no attachment should issue in respect of "such cause of action." *Held*, insufficient.

It is unnecessary in an affidavit for attachment to state the grounds of plaintiff's apprehension of losing his debt. *Davidson v. O'Connell et al.*, 3 Pug. 684.

*Quere*—As to effect of reference to particulars annexed in rendering affidavit uncertain. *Ib.*

### 13—Affidavit by Agent.

An affidavit for an attachment made by an agent is in that respect good if it describes the deponent as "agent" without alleging that he is agent. The agent may state his own "apprehension that unless attachment is issued the plaintiff will lose his demand." The statement that no agreement was made whereby an attachment should issue in respect of such "cause of action" is not sufficient, where the affidavit alleges several causes of action. Per *Wetmore, J. Robin et al v. Taylor*, 1 P. & B. 208.

### 14.—Affidavit—Requisites.

Before an attachment can issue under the act 37, Vic., cap. 7, there should be an affidavit of the plaintiff himself, stating that no agreement was entered into whereby no attachment should issue, that the attachment is not sued out for the purpose of harassing defendant or to delay or defraud his creditors, and the apprehension of plaintiff that he will lose his demand unless attachment is issued.

And if such an affidavit can be made by a third person, it must be shown that he is agent of the plaintiff, that he had the general charge and management of his business, was fully acquainted with the fact, and that the attachment was issued by his direction.

The affidavit must also state that plaintiff—not the deponent—is apprehensive.

(See, however, now, Con. Stat., cap. 42, allowing agent to state his own apprehension.)

It is not necessary that one person should swear to all the facts required by the statute, but there may be several affidavits. *Muirhead v. Arbo*, 3 Pug. 283.

**15—Imprisonment for debt—Defendant about to quit the Province—Affidavit for Arrest, 37 Vic., Cap. 7, Sec. 77.**

An affidavit made under the "Attachment and Abolition for Imprisonment for Debt Act," 37 Vic., cap 7, (Con. Stat. cap. 38, sec. 2,) on which a judge's order was granted for the arrest of defendant, stated that there was a probable cause for believing defendant was about to quit the province, and that his absence would materially prejudice plaintiff in the prosecution of his suit. *Held*, that the affidavit was insufficient in not stating the reasons for plaintiff's belief. Per Allen and Wetmore, J. J., but per Weldon and Fisher, J. J., that it was sufficient for plaintiff to swear in the words of the 77 sec. of act. *Jenkins v. McFee*, 3 Pug. 41.

**16—**In an affidavit to hold to bail, under act 37 Vic., cap. 7, sec. 77, (Con. Stat., cap. 38, sec. 2), it is not sufficient to follow the words of the act without setting forth the grounds for deponent's belief that defendant is about to quit the province, and in what manner plaintiff will be prejudiced in prosecution of his suit. Per Ritchie, C. J., and Allen and Wetmore, J. J., Weldon and Fisher dissentientibus.

**16a—**In an affidavit to hold to bail under the act 38 Vic., cap. 4, sec. 2, it is not sufficient to swear in the

words of the statute, without setting forth the grounds of the plaintiff's expectation of recovering his debt by the defendant's arrest. Per Allen, C. J., and Wetmore and Duff, J. J., Weldon and Fisher dissentientibus. *Stephenson v. Elliott*, 3 *Pug.* 199. *McIntosh v. Burnett, et al.*, 3 *Pug.* 253. (See new amendments to act 88, Vic., cap. 4, sec. 2, by Con. Stat., cap. 88, sec. 1, which omits the provision of requiring grounds, etc., to be stated.)

**17—Insolvent Act of 1875.—Defendants addition and residence.**

In an affidavit for attachment under insolvent act of 1875, it is not necessary to state the defendant's residence and description in the body of affidavit, it is enough if it appear in the title of the cause. *Colwell v. Robertson*, 1 *P. & B.* 481.

The affidavit must state facts showing that the defendant's estate has become subject to compulsory liquidation; mere hearsay is not sufficient. *Ib.*

**18—To hold to Bail—Insufficiency of Affidavit.**

An affidavit to hold to bail stated, that certain goods were shipped at Liverpool on board a certain vessel, of which the defendant was master, to be brought to St. John; that the defendant signed a bill of lading to deliver the said goods to the plaintiff at St. John; that the vessel arrived at St. John with only a part of the goods on board; that the defendant informed the plaintiff that he had sold certain goods (describing them) belonging to the plaintiff, of the value, etc. *Held*, that this affidavit disclosed no cause of action, that it was consistent with the statements in it, that the sale of the goods by the master of the vessel was justifiable, and therefore that an order for bail should not have been made. *Nevins v. Call. Hil. T.* 1871.

**19—Attendance of Witnesses—Sufficiency of Statement**

An affidavit of attendance of witnesses, which referred to a Schedule annexed, and merely stated, "that the annexed contains a true statement of the names of the witnesses subpoenaed, attending and examined at the trial, was held insufficient. *Shephard v. Shephard*, 2 *Pug.* 452.



**20—Assessment of Damages.**

In assessing damages on judgment by default the debt must be established by legal proof, an account showing several sums of money due from defendant to the plaintiff on various transactions, with an affidavit of the plaintiff that the account was just and true. *Held*, insufficient. *Mitchell v. Lawther*, 1 *Pug.* 79.

**21—Patent Injunction.**

A party applying for an injunction under section 24 of "The Patent Act of 1872," during the pendency of the action, is bound to show by his affidavits that his patent is valid, and that an actual infringement has taken place, and also the particulars in which it consists. *Hamilton v. Thompson*, 8 *Pug.* 237.

**22—Insolvent confined Debtors' Act—Second Application.**

In application to court for discharge under "Insolvent confined Debtors' Act," the affidavit must state the reason why former application before justices was refused. See Insolvent confined Debtors' 25. *Higgins v. Hamilton*.

**23—Presentment—Affidavit to hold to bail should set it forth.**

An affidavit to hold to bail in an action on a note payable at a particular place, must allege presentment at that place. *Cushing v. Gordon*, 6 *All.* 524.

**24**———If the note is drawn and payable in a foreign country, by the law of which presentment at the place of payment is not necessary to be proved as a condition precedent to establish the plaintiff's right to sue, it must be so stated in the affidavit to hold to bail, and cannot be shown in answer to an application to set aside the arrest because the affidavit did not allege presentment. *Ib.*

**25.—Affidavit of Debt—Part Bad—Bail reduced to amount properly stated.**

An affidavit of debt alleging several distinct and separate causes of action, some of which are well stated, and others not so, is not bad altogether; but in such case the bail will be reduced to sum properly stated. *Cushing v. Gordon*, 6 *All.* 524.

**26.—Affidavits to obtain Garnishee order—Requisites of.**

See Attachment.

**27.—Affidavit to hold to Bail — Filing — Pleading—Waiver.**

See Bail, A. 10, *Read v. McLellan*. B. 80, *McPhelim v. Larson*.

## IV.

## PARTICULAR PERSONS.

**1 Jurors.**

Affidavits of Jurymen stating that they had received evidence after retiring from the bar, cannot be received to impeach their verdict. *Att'y General v. Boyer*, C. Ms. 78.

2 ———— On a motion for a new trial, an affidavit stating that one of the jurymen had informed the deponent that the verdict was decided by lot, will not be received. See *Hodgson v. Carr*, 8 Kerr 499.

3 ———— Affidavits of Jurors refused to be received stating that they found the defendant was not in a proper state of mind to understand the deed, and intended to assign that as a reason for their verdict. See *Babbet v. Cowperthwaite*, 3 AU. 378.

**—Sheriff on Deed—Time of making.**

See Sheriff's Deed 3. See Deed I. 87.

**4—Party—Attendance of Witnesses.**

Affidavit should state the belief of deponent that witnesses attended the number of days. See *Taylor v. Travis*, 3 AU. 505.

**—Administrator on deed—Evidence of what.**

See Deed I. 24.

**—Executor—Deed.**

See Deed V. 7.

**5—Arbitrator—Affidavit of.**

Not admissible to shew that if they had known they had no power over the costs, they would have awarded a different amount to plaintiff. See *Arbitrations and Awards* V. 3.

**6—Affidavit of dissenting Jurymen.**

An affidavit of a dissenting Jurymen in relation to what passed between the dissenter and his fellow Jurymen is objectionable, and should not be received on motion for a new trial. This rule would not be applicable as to statements

which took place in open court, or in denying personal misconduct imputed to them. *Bennet v. Smith*, 1 P. B. & 27.

## V.

## JURAT.

**1.—Omission of Place.**

When the jurat omitted to state the place where an affidavit taken before a Commissioner was sworn, the Court would not allow it to be read. *Rankin v. Downes*, 1 Kerr 88.

**2—Signature.**

Omission of signature in jurat of affidavit of applying creditor under Absconding Debtors Act, a fatal defect. See Absconding Debtor 14.

**3—Description of Commissioner.**

If an affidavit is properly entitled in the Court, it is sufficient in the jurat to describe the person before whom it is sworn, "A Commissioner, etc., Supreme Court." *Ex parte Morse*, 3 Kerr 866.

**4 —Illiterate Person.**

The jurat of an affidavit made by an illiterate person must state that it was read by the Commissioner to the deponent before swearing, in the terms of the rule of Hil. T. 1848. *Ex parte Irvine*, 2 All. 472.

**5—Omission of words.**

If the words "before me" are omitted from the jurat of an affidavit, it is a nullity. *Lyons v. Allison*, 5 All. 367.

**6—Obliterations.**

If there is an erasure, obliteration, or alteration in the jurat of an affidavit, it cannot be read; but where it appeared, on inspection of the affidavit, that the alleged obliteration was a flourish with the pen, forming part of the signature of the Commissioner, the affidavit was held sufficient, though such "flourish" passed through the date of the jurat and partially obliterated it. *Doe dem Trider v. McIntosh*, East. T. 1871.

**7—Objection to jurat—When must be taken.**

Where copies of affidavits in support of a motion have been served agreeably to rule 2, Hilary Term, 6 Wm. IV., any objection intended to be made to the jurat of the original affidavit should be taken before the affidavit is read, and cannot be taken afterwards— *Jarvis v. Peck*, 8 Kerr 507.

**—Commissioners name omitted—Motion refused for defect.**

See *Belyea v. Hamm*, 2 Han. 27.

**8—Statement of Place.**

An affidavit purporting to be sworn in the County of Halifax, before a judge of the Supreme Court of Nova Scotia, is sufficient, without it stating that Halifax is in Nova Scotia. So also where the jurat was—"Sworn to at the city of Bloomington, this &c., before me, A. B., a notary public for the state of Illinois." It was held sufficient.—*Bank of Nova Scotia v. Morron*, 1 P. & B., 344.

**9—Jurat—Want of Signature—Waiver.**

The want of a signature to a jurat of the affidavit of the applying creditor, upon which a warrant of attachment is issued under the Act 26 Geo. III, cap. 13, is a fatal defect in the proceedings, and is not waived by an application for a *supersedeas* by the debtor. *Ex parte Nason*, *Easter T.*, 1838.

## VI.

## MISCELLANEOUS.

**1—Shewing Cause.**

Where the facts stated in the affidavit, upon which a rule *nisi* is obtained are positively contradicted by the affidavits used on shewing cause, the latter must prevail. *Ellis v. Newton*, *Ber.* 77. *Ray v. Desbrisay*, *Mich. T.* 1866.

2—If the affidavit in support of a motion, and that in shewing cause are contradictory, greater credence is to be given to the last affidavit, unless there are circumstances

in the case to throw discredit on the latter; therefore, on motion of a party for the restitution of certain rooms in a house, supported by affidavits, which were contradicted by affidavits in shewing cause, and the probabilities of the case supported the last statement, the motion was dismissed. *Doe dem Johnston v. Roe*, 3 Kerr 400.

### **3—Deponent's Addition—Memorial.**

The omission of the deponent's addition in an affidavit of the Clerk's signature to a memorial, does not make it a nullity. *Scott v. Garnet*, 2 All. 624.

### **4—Unsuccessful application—Previous Affidavits.**

Where an unsuccessful application is made to a Judge, and afterwards renewed before the Court, all the affidavits used before the Judge should be produced. *Riordon v. Dunn*, 3 All. 124.

### **5—Irregularity—Waiver.**

An irregularity in an affidavit to hold to bail is waived by pleading to the action. See Practice VII. 4. *McPhelim v. Larson*.

### **Exemption—Proof of.**

See Evidence VII. 5. *Wentworth v. Hallett*.

### **6—Amended Affidavit—Security for Costs.**

Where an application to a Judge at chambers for security for costs has failed on the merits, a new application may be made to the Court on amended affidavit.

See Costs VI. *Foster v. Amiraux*.

### **Sheriff's deed—Deputy Sheriff.**

See Evidence XI. 1. *Doe v. Barlow*.

### **Casual Ejector—Judgment against—Vacant Premises.**

See Ejectment IV. 2. *Doe dem Gilbert v. Roe*.

### **Lost Deed—Secondary Evidence.**

See Evidence VII. 18. *Doe dem Crider v. McIntosh*.

**7—Ejectment—Non-payment of Rent.**

Affidavit of service of declaration by fixing a copy to the door of house, should state the name of the tenant from whom the rent is due. *See Doe dem White v. Roe, 2 Kerr 360.*

**8—New Matter—Filing Affidavits—Leave.**

There is no arbitrary rule that an application for leave to file affidavits in answer to "new matter," under the Act 19 Vic. cap. 41, sec. 20, should be made before argument commences on the affidavits containing the new matter. *Wetmore, J., dissentiente.*

*See (Swinfen v. Swinfen, 1 C. B. 364.) Mitchell v. Sawther, Mich. T. 1871.*

9—Leave will not be granted to file affidavits in answer to "new matter" under the Act 19 Vic. cap. 41, sec. 20, where the facts sought to be answered must have been within the knowledge of the party at the time he made his affidavit, and should have been stated by him at that time. *Ex parte Gilbert, 1 Pug. 231.*

**10—Perjury—when not assignable on.**

Perjury cannot be assigned upon an affidavit taken before a Commissioner who had no authority to take the affidavit.

*See Regina v. McIntosh, 1 Han. 372.*

**11—Service—Sufficiency of Affidavit.**

When the affidavit stated service of motion to have been on B. W. H., without stating that he was the party's attorney—*Held*, insufficient. *Brown v. Bartlett, 3 Kerr 369.*

**———Service of notice on student—Requisite statement.**

Affidavit of service of a notice of motion "on a student in the office of plaintiff's attorney" not sufficient, it not stating that the service was at the office. *Ber. 342.*

12—Affidavit should state name of person upon whom process served, when not served personally.

*See Sandall v. Godsoe, 1 All. 441.*

**13—Drawn in third person.**

Since rule of court. Hilary, T., 1875. An affidavit drawn in the third person cannot be read. *Welling ex parte*, 3 Pug. 217.

**14—Insolvent Act of 1875.—Motion to set aside attachment for defect in affidavit.**

An application to set aside an attachment for defect in affidavit on which it is granted, must be by petition under the 18th section of the Insolvent Act of 1875, as amended by the 39 Vic., cap. 80, sec. 3. *Colwell v. Robertson*, 1 P. & B. 482.

**15—Waiver of defect in affidavit.**

A writ of *capias* was issued on 20th November, executed on 22nd December, and filed on 13th January, following; no appearance was entered for defendant. On the 20th January the bail gave notice of special bail, previous to which it was agreed between defendant and plaintiff, this special bail should be put in and the amount should be paid within a certain period from the arrest, until which time plaintiff should not file declaration. On February 9th, defendant told plaintiff's attorney he was going to see plaintiff and arrange. On February 8th, defendant's counsel moved to set aside arrest for defect in affidavit to hold to bail. *Held*, that under the circumstances of the case, defendant was too late in his application, and that by the delay, and what had taken place between the parties, the defect in affidavit was waived. *McIntosh v. Burnett*, 3 Pug. 254.

**16—Names of all Lessors of plaintiff not stated in body of affidavit.**

When, in affidavit for application for an *alias* writ for contempt, the names of all the lessors of plaintiff were not stated. *Held*, no objection to affidavit, the case being described as John Doe, on the demises of Edward Bogswell and others, &c. *Regina v. Knapp*, 1 P. & B. 288.

**17—Addition of deponent.**

It is sufficient to give the addition of a deponent thus:—"J. F. of, &c., formerly a member of the firm of F. & S. of, &c., attorneys for the above named plaintiffs." *Bank of Nova Scotia v. Marrow*, 1 P. & B. 348.

**18**——Using affidavit made on previous application made without prejudice deemed improper, but not ground for new trial. *See* new trial. *Jones v. Botsford*.

**Filing affidavit.**

*See* Bail.

**Review—Use of affidavits on.**

*See* Review.

**Part affidavit—Use and admission of on trial.**

*See* Defamation 14. *Milner v. Gilbert*.

*See* further—Practise in Equity.

**AFFINITY.**

**Of Sheriff—Coroner.**

*See* Jury, 6, 7.

**AGENT—AGENCY.**

*See* Principal and Agent.

" Election.

**AGREEMENT.**

*See* Contract.

**1—Liability—Limitation of—Construction.**

Defendants, trustees of A., an insolvent debtor, purchased from the plaintiff, lumber sawed by him at a mill which had been occupied by A., and in consideration thereof agreed to release him from all debts due by him to A., and to pay him £120. It was stipulated in the agreement that the defendants were not to be personally chargeable for the payment of the money, but that the lumber alone



was to be subject to the payment thereof. *Held*, that the effect of this clause was not to exonerate the defendants from liability if they improperly appropriated the proceeds of the lumber (as in paying a claim for rent on the mill), but to limit their liability to the true net proceeds of the lumber. *Nisbit v. McLean*, 2 Kerr 565.

**2—Substituted Agreement—Position of parties altered by—Defence in Action.**

K., who held a quantity of logs claimed by P., sold them to H., who placed the money in the hands of defendant, both parties agreeing that if not replevied by P. in six days it was to be paid to H.—P. was about to replevy, but before the six days expired, K. agreed with him to submit the matter to arbitration, the money to abide the event; but after the time elapsed, K. refused to arbitrate, and claimed the money under the first agreement. *Held*, In an action against defendant on the first agreement for the money, that as the substituted agreement altered the position of the parties, it was an answer to the action. *Keith et al., administrators, v. Skinner*, 1 Han. 584.

**3—Compensatory Agreement—Want of consideration  
No loss sustained—No right of action—Fraud on Crown.**

Plaintiff and defendant being licensed by the Crown to cut timber on adjoining tracts of land, and the defendant having by mistake cut upon the plaintiff's license, they entered into an agreement whereby the defendant, in consideration of the timber cut by him on the plaintiff's license, granted and made over to the plaintiff all his (defendant's) interest in a certain part of the ground described in his license, with the right to cut and carry away the timber therefrom, and agreed that he (defendant) would not cut any more timber on the ground so transferred to the plaintiff. *Held*, 1st. That as the timber when cut by the defendant on the plaintiff's license remained the property of the Crown, and did not vest in the plaintiff, he had not sustained any loss of property by the defendant's act, and

therefore there was no consideration for the agreement. 2nd. That without the assent of the Crown, the agreement did not operate as an assignment of any right to the plaintiff, and therefore the breach of it gave him no right of action. 3rd. That the effect of the agreement being to allow the plaintiff to commit a wrong on the Crown it was illegal. *Sharp v. McKeen*, 2 Kerr 524.

**4—Signing of agreement delayed—Subsequent signing—Retrospective effect.**

Where an agreement to perform work has been reduced to writing, but is not actually signed till a future day, there is nothing to prevent the parties from binding themselves and making the agreement effective from the day it was entered into, though prior to the signing of it. *Fennety v. Simonds*, 5 All. 547.

**5—Construction—Logs.**

A contract to deliver a quantity of logs does not necessarily mean "merchantable logs," according to 1 Rev. Stat. cap. 96, but may mean such logs as are actually got in the part of the country where the parties live, and in construing the contract, the surrounding circumstances, and the fact that merchantable logs could not be got in that part of the country, may be taken into consideration. *Dollard v. Potts*, 6 All. 443.

**5a—Declaration on such contract.**

It is not necessary in declaring on such a contract to describe the logs otherwise than as stated in the agreement.

The declaration set out a contract to deliver logs in the defendant's mill pond; the evidence was that the defendant owned a saw mill on a stream below where the logs were cut and hauled, and that he told the plaintiff to "drive" the logs down. *Held*, That the contract was moved. *Ib.*

**5b—Statute of frauds—Not available after delivery of logs.**

After delivery of the logs to defendant he cannot object in an action for breach of the agreement, in not paying a sum of money to a creditor of the plaintiff, in consideration of getting the logs, that the contract is void under the statute of frauds not being in writing. *Ib.*

**6—Personal liability—Company represented to be incorporated—Misrepresentation as to incorporation.**

Plaintiff entered into an agreement with a Society by name, to do certain work: the Society was represented by the Committee acting on its behalf to be incorporated, and the contract was under seal, represented to be the corporate seal of the Society, and by a clause in the contract it was proved that the Committee should not be personally or individually liable to the plaintiff. It appeared afterwards that the Society was not incorporated. *Held*, That, as there was no Company to be held responsible under the contract, the members of the Committee who had received the benefit of the plaintiff's work were personally liable; that the clause in the agreement against their personal liability was only intended to apply where there was an incorporated company liable on the contract, and was repugnant and void where there was no such company to whom the plaintiff could resort for payment. *Hodge v. Reid*, *Mich. T.* 1872.

**7—Statute of Frauds—Interest in Land.**

Where the respective owners of adjoining lands agree by parol to a survey and marking of the division lines, the Court in an action of trespass, *qu. Cl. fregit*, by one against the other, *Held*, That such agreement was not within the statute of frauds, not being for the transfer of any interest or title to land. *Lawrence v. McDowall*. *Ber* 283.

**8—Boundary lines—Parol agreement as to binding operation.**

When a division line is in dispute between parties, and they agree to establish a time, and do so, and act upon it by putting up their fences, and by severally occupying the land on each side, they are bound by their agreement, whether the line is right or wrong, and cannot repudiate it, though they may not have held under it for a period of twenty years, so as to gain a title by adverse possession. *Perry v. Patterson*, 2 *Pug.* 367.

**9—Easement—Lease—Statute of Frauds.**

An agreement for the use of driving power of an engine is only an easement which cannot be created by parol, and a parol agreement would be determined by a conveyance to a third person from the party agreeing to give the power.

A verbal agreement to lease premises for three years from a future time is void, under the Statute of Frauds, and although by entry and payment of rent to the Mortgagor in possession, the party would become a tenant from year as to him, he would be nothing more than a tenant at will to the Mortgagee, or a person claiming through him. *Brewing v. Berryman*, 2 Pug. 115.

**10—Third party—Want of consideration.**

Plaintiff sued upon the following instrument:—"12 months from the 26th June, 1873, I (defendant) will pay J. C., (plaintiff), \$90 for D. P., or otherwise settle the sum of \$90 for him on a note that he says he gave J. C. for \$100." *Held*, That this was not an agreement with plaintiff with D. P., and there was no consideration for the contract. *Cochrane v. Care*, 8 Pug. 224.

**11—Agreement.—Agent—Authority—Trove.**

In trover for timber, plaintiffs claimed under an agreement made by D. of the one part, and S. (under whom the defendant claimed) of the other part, whereby D. granted license to S. to cut timber on certain land, the timber to remain the property of the grantor till the stumpage was paid. The agreement was signed by D. "for the proprietors," and it was sworn by D. that the plaintiffs were the proprietors of the land, and that he acted as their agent in making the agreement. *Held*, Ritchie, J., dubitante. 1st. That it appeared by the agreement that it was made by D. as agent for the proprietors of the land, and that they could take the benefit of it.

2nd. That if the agreement was made between the plaintiffs and S., the defendant, claiming under S., could not dispute that the plaintiffs were the proprietors of the land. *Hersey et al v. Hatheway*, 6 All. 237.

**12—Parties entitled to bring action—Interest.**

Where the words of an agreement are joint, yet if the interest be several, each party may maintain an action, thus:—Where the defendant guaranteed “that the wages due W. K. and G. N. from J. K. for making timber shall be satisfied when they brought the timber up,” and the contract of hiring by W. K. and G. N. was separate and distinct. *Held*, That each could maintain an action on the guarantee. *Neville v. Joseph, Hil. T. 1892.*

**13—Right to rescind agreement.**

Where a number of persons jointly agree with another as to any particular matter, the agreement can only be rescinded by the consent of all. *Palmer v. Long, Ber. 122.*

**Agreement in writing for exchange of land accompanied by possession—Operation of.**

*See Deed V. 1. Sutherland v. Walter.*

**———To sell land—Refusal to complete—Liability for use and occupation.**

*See Use and Occupation, 1. Parker v. England.*

**———To lease—Payment—Provision for purchase—Liability of defendant.**

*See Landlord and Tenant I. 8a. McCallmont v. Mulhall.*

**———For sale and conveyance of land—Possession under agreement—Tenancy.**

*See Tenant at Will 5. Doe v. Denny.*

**———To purchase land from owner—Effect of writing—Tenancy.**

*See Tenant at Will 2. Doe v. Connaway.*

**———Respecting stranded vessel—No property passing.**

*See Shipping Law 7. Brown v. Nickerson.*

**Subsequent parol agreement to deed.**

*See* Deed V. 8. *McKendrick v. Purdan.*

**Trustee and Cestui que trust—Validity of agreement between.**

*See* Equity. *Botsford v. Crane.*

**Breach of Agreement—Unpaid Instalment—Damages—Cross action.**

*See* Damages.

**Action before expiration of credit.**

*See* Action at Law VII.

**Action for breach of agreement — When remedy not suspended.**

*See* Assumpsit I. 1. *Lock v. Purdon.*

**ALTERATION.****1—In deed—Materiality.**

Whether an alteration in a deed of conveyance of the number of acres sold is such a material alteration as to require explanatory evidence before deed is admitted in evidence.

*See* *Moran v. Laird*, 8 Kerr 408.

**Of Writ—Statute of Limitations.**

*See* Amendment 80. *See* also Limitation of Actions III. 1, 2.

**2—Re-sealing Writ.**

An alteration made in, on the return day of a writ, though before it is returnable, vitiates it, unless it is re-sealed. *Andrews v. McKenzie*, 1 All. 264.

**Of Highway—Notice.**

*See* Highways 11.

**Of Note.**

*See* Bills and Notes, VI. 8. *Street v. Walsh.*

**ALBERT MINING COMPANY.**

*See* Joint Stock Company 15.

**AMBIGUITY.****Boundary Line.**

*See* Crown Grant I. 5, 9.

**Policy of insurance—Description of voyage.**

*See* Insurance 21.

**Language in letter ambiguous—Construction against writer.**

*See* Accord and Satisfaction 2. *Weldon v. Vaughan.*

**Defendant entitled to benefit of doubt when plaintiff leaves matter in doubt.**

*See* Absconding Debtor 17. *Cullen v. Voss.*

**Ambiguity in pleading—Construction against party pleading.**

■ *See* Pleading IV. 7.

**Statute — Construction when doubtful — Benefit to whom given.**

*See* Mandamus 16.

**ALIAS FIERI FACIAS.****Sheriff's Sale on—Original writ not necessary to be proved.**

*See* Sheriffs Deed 6.

**ALIEN.****I—Liability for Tax.**

An alien resident in this Province is liable to the payment of an exempt tax of thirty shillings annually, under the Militia Act 6 Geo. IV, cap. 18: and not merely to one payment of that sum. *Watson v. Haley*, 1 Kerr 124.

**2—Tax, when recoverable.**

The alien tax imposed by the Act 6 Geo. IV, cap. 18,

must be recovered by the quarter master in office when it is incurred; therefore, a conviction for £8 for alien tax for the years 1845 and 1846, on the prosecution of a quarter master appointed in 1846, not being severable, is bad. *Brannen v. Dunn*, 1 *All.* 218.

### 3—Officer's Return—Evidence.

The return made by a captain of a company to a quarter master of militia, according to the Act 6 Geo. IV, cap. 18, stating a party to be an alien, is not sufficient evidence of that fact. *Brannen v. Leavitt*, 1 *All.* 220.

### 4—Recovery of Judgment against, for tax—Evidence.

The recovery of a judgment against a party for his tax as an alien, on the prosecution of a quarter master of militia, without shewing that it has been paid, is not sufficient evidence of his being an alien, in a prosecution for a subsequent year's tax. *Brennan v. Williams*, 1 *All.* 221.

### 5—Discharge.

An alien cannot discharge himself from the tax imposed by the Act 6 Geo. IV, cap. 18, by shewing that he had enrolled himself and served in the militia of the Province. *Brennan v. Williams*, 1 *Kerr* 222.

### 6—Naturalization of.

The certificate required by the Act 31, Vic. cap., 66, sec. 5, must be both filed and openly read in Court on the first day of the term. *Ex parte Doe*, 2. *P. & B.* 302.

## ALIMONY.

*See* Court for trial of matrimonial causes.

## AMENDMENT.

- I. PLEADINGS.
- II. WRITS—RETURNS.
- III. RECORDS—ROLLS—BAIL—PIECE—RULES.
- IV. MISCELLANEOUS.

### I.

#### PLEADINGS.

**Warrant—Substituted for Summons.**

*See* Malicious Prosecution 5.



**Nisi Prius Record—Copy—Variance.**

*See* New Trial III. 58.

**Amendment at Trial—Description of Will.**

*See* Pleading I. 24.

**Replevin Bond—Statutory form.**

*See* Bond 18.

**After Demurrer Books delivered—Allowed.**

*See* *Pine v. McLachlan*, Ber. 81.

**1—Variance—Record—Description.**

On the trial of an issue on *nul tiel record*, a variance between the record produced and the description of it in the declaration and replication may be amended. *See* *Roberts v. Watson*, 1 All. 2.

**Declaration.**

Promissory Note—doubt whether given to one or both defendants. *See* Pleading I. 26.

**2—After Judgment on Demurrer.**

Court granted leave to amend the declaration where the plea, if allowed to stand, might be a bar to the whole cause of action—the demurrer having likewise arisen out of Acts of Assembly, complex and difficult in construction. *Coy v. Barker*, 1 All. 29.

**3—After second Demurrer.**

After judgment on a second demurrer to a declaration on an administration bond, leave was given to make a second amendment; the plaintiff's counsel stating that he had been misled by an expression of the Court in giving judgment on the demurrer. *Sherlock v. McGee*, 1 All. 436.

**4—Declaration—Indorsement of Bill.**

In action by Survivors of Firm, the declaration alleged the bill was indorsed to Firm. *Held*, That the declaration might be amended under Act 7 Wm. IV. cap. 14, sec. 7. *See* *Tarratt v. Wilmot*, 1 All. 353.

**5—Trespass—Error in copying Declaration.**

Where an attorney's clerk in copying a declaration in trespass, inserted the word "whereas," in consequence of which the defendant demurred, and the plaintiff being unable to discover any error in the draft of declaration, applied to the defendant to be allowed to inspect the copy served, and offered to pay him the costs of amending, if necessary, which the defendant refused to comply with, and on argument of the demurrer, judgment was given for the defendant; the plaintiff was allowed to amend on payment of costs up to the time of the demurrer—it appearing that the draft and copy of declaration filed were correct. *Wilson v. Andrews*, 1 All. 670.

**6—Trespass—Defendants not all served with process—Striking out of Nisi Prius Record and Declaration, name of defendant not served.**

In trespass for assault against three persons, one of them was not served with process, the others appeared and pleaded, and a verdict was found against them. A motion having been made to set aside the verdict and Nisi Prius record on the ground that the cause was not at issue till the other defendant was before the Court, the plaintiff was allowed to amend by striking the name of that defendant out of the Nisi Prius record and declaration, and the defendant's rule was refused. *Ayre v. Main*, 6 All. 516.

**7—Adding Counts—Refusal.**

In an action against the registered owner of a vessel for negligence of the master, whereby the cargo was detained, and the plaintiff sustained damage, and had to pay a sum of money to get possession of the cargo, a verdict was given for the plaintiff. On motion to enter a non-suit on the ground that the defendant, as registered owner, was not liable, the Court refused to amend the declaration by adding a count charging him with being the agent of the of the master, and wrongfully advising him to detain the cargo unless plaintiff paid him \$496, and alleging that the defendant did detain the cargo till such money was paid,

—the object of such amendment being to retain the verdict for the amount so paid to defendant. *Newbury v. Young*, 1 *Pug* 148.

**8—Striking out name of one of defendants—Not shewing prejudice.**

An application to amend at Nisi Prius by striking out the name of one of the defendants was opposed on the ground that such defendant was entitled to costs, and that the other defendant was entitled to shew by affidavit that he would be prejudiced by the amendment. The Judge offered to receive the *viva voce* evidence of the attorney and the other defendant on these points, which was declined. *Held*, That the amendment was properly made, without costs to the defendant, whose name was struck out. *Morrow v. Hamilton*, *Hil. T.* 1872.

**9—Variance in Note—Judge's decision on trial.**

In an action on a promissory note alleged to be payable on demand, the note offered in evidence was payable twelve months after date: the plaintiff having applied to amend, the defendant asked for time till the next day to obtain the affidavit of the real defendant. The Judge refused this, but offered to allow the defendant about half an hour for the purpose, which he declined, and the amendment was accordingly made. The Court refused to interfere with the Judge's decision,—it appearing that there was but one note between the parties, that the defendant had seen it in the hands of the plaintiff's attorney after the action was brought, and had promised to pay it, but afterwards refused to do so. *Minas Insurance Co. v. Rivers*, 1 *Pug*. 163.

**10—Ejectment—Demise expired.**

Where the demise stated in a declaration of ejectment had expired, the Court refused after a delay of three years, to allow the plaintiff to amend by extending the demise, though it was suggested the defendant would set up the statute of limitations as a defence to a new action. *Doe v. Todd*, 1 *All.* 601.

**11**——Where an action of ejectment was commenced in 1849, the demise in the declaration being for seven years, and judgment was signed in that year, but no writ of possession was issued, and the tenant had since died; the Court refused to enlarge the demise, though the lessor of the plaintiff swore that he had abstained from issuing execution at the request of the tenant, who had promised to pay the costs and to indemnify the lessor of the plaintiff against a legacy which was charged on the land, and which he had been obliged to pay in 1864. *Doe d. Fauls v. Jones, Mich. T. 1865.*

**12—Description—Abuttals.**

In trespass *quare Cl. fregit*, not describing the close by abuttals, defendant pleaded *liberum tenementum*, and proved title to a close within the parish mentioned in the declaration; the plaintiff was allowed to amend, setting out the close by abuttals, the defendant refusing to swear he would be prejudiced thereby. *Desbrisay v. Livingstone, 5 All. 240.*

**13—Special Entitling—Commencement of Action.**

In an action on a promissory note dated 22nd April, 1864, payable twelve months after date, the declaration was entitled of Easter Term, 1865, (the first day of which was before the note was due,) and the Judge allowed the record to be amended by entitling the declaration specially of a day subsequent to the note becoming due. *Held*, (after inspecting the writ in the cause) That the amendment was properly made. *Brown v. Foster, 6 All. 408.*

**14—Consideration—Allegation—Proof.**

It is necessary not only to allege the actual consideration, but the proof must correspond with the allegation. In this case the plaintiff alleged that the consideration consisted of *certain standing trees, goods, wares, and merchandize, and stumpage*; the evidence shewed the consideration to consist of stumpage alone. A verdict having been taken for the plaintiff, subject to a motion for a nonsuit,

the Court allowed the plaintiff to amend on payment of all costs, and made the rule absolute for a new trial instead of a nonsuit, on the condition of the payment of such costs. *Whitney v. Marks*, 1 Kerr 179.

**15—Entitling Declaration in the Record—Limitation of Action—Insurance Policy.**

By one of the conditions of a policy of insurance the non-commencement of an action within a year after the loss was declared to be a defence. In a suit on the policy this objection was taken; it appearing by the *Nisi Prius* record that the action was commenced after the year. Application to amend the entitling of the declaration in the record was refused, there being nothing to show that such amendment would make the record correspond with the declaration on file. Evidence was also offered to shew the time of commencing the action, which the Judge thought insufficient, and the plaintiff was nonsuited. *Commercial Bank v. Ætna Ins. Co.* 5 All 441.

**16**———If it had appeared that the declaration on file was entitled of a term within the year. *Semble*—That the Court on motion for a new trial would have amended the *Nisi Prius* record to correspond with it.—*Ibid*.

**17—Plea—After Demurrer.**

After demurrer is argued the Court will allow the plea to be withdrawn upon payment of costs of demurrer. *Strang v. Bell*, *Ber.* 287.

**Replication—Omission of entry of former proceedings.**

*See* Pleading I. 7.

**Death—Suggestion of.**

*See* Summary Action 4.

**18—Bill in Equity Pleadings—Practice.**

A Court of Equity has an inherent power to amend the pleadings in a cause, and an amendment may be made

*ex parte*; though, ordinarily, notice should be given. *Wiggins v. Hendricks*, 1 *Pug.* 150.

In a foreclosure suit, the mortgage was particularly set out in the bill, and the land described as being in the Parish of K. (according to the mortgage): the bill was taken *pro confesso*, and the plaintiff afterwards discovering that part of the land was in the Parish of N., obtained an *ex parte* order to amend the bill in the description of the situation of the land. The property was sold under the decree in February; the defendant knew of the advertisement, and was present at the sale; and in May he applied to set aside the proceedings for irregularity. *Held*, 1. That the mortgage having been particularly set out in the bill, no amendment was necessary. 2. That if the amendment was necessary, the defendant had not been prejudiced by it. 3. That if an amendment made *ex parte* was irregular, the defendant should have applied before this sale, to set aside the order, and had waived the objection by his delay. *Ibid.*

The Appellant in this case having applied for costs, the application was refused, there being no misconduct shown on the part of the respondent. *Ibid.*

#### 19—Declaration.

Where the declaration did not allege any usage to carry deck loads in the trade between New York and Saint John, and both parties gave evidence in regard to such usage, the one to establish, the other to negative any such usage, it was held that an objection on that ground taken on motion for a new trial was made too late, and that the court might allow the plaintiff to amend the declaration or add a new count. *Cameron v. Domville*, 1 *P & B.* 647.

#### 20—Misnomer.

A Judge at *nisi prius* has power to order the name of a plaintiff to be amended under section 163 of C. L. P. Act; *Copp et al. v. Read et al* 3 *Pug.* 527. If defendant has not been deceived and knows that the action was brought by the person who actually sues, amendment in such case not necessary, Per *Wetmore. J.* *Ibid.*

**21—Plea.**

Where a party sued upon a policy of Marine Insurance and the declaration alleged damage to the goods insured and abandonment to the insurers, and acceptance of the abandonment, and sale, a plea stating that the plaintiff at the time of effecting the insurance falsely misrepresented the value of the property, without averring that the defendants were not aware of the fraud when they accepted the abandonment, and tendered back the proceeds as soon as they became aware of it, was held bad. Leave was given to amend the plea by adding that the defendants did not know of the fraud, when they accepted the abandonment. *Lloyd v. Union Insurance Co.* 2 *Pug.* 498.

Application to amend held not necessary to be made on common motion or before a judge at Chambers. *Ibid.*

**22—Ejectment—Demise.**

An application to amend the term of the demise stated in a declaration in ejectment, so as to enable the lessor to issue execution, refused after the lapse of 15 years, and after the death of the tenant. *Doe d. Fauls v. Fen*, 6 *All.* 328.

**Objection to pleas on several grounds—Plaintiff succeeding on one only—Amendment allowed without payment of costs.**

*See* Pleading II. 51. *Milner v. McKenzie.*

**Declaration amendable as to description—Amendment must be made at trial.**

*See* Pleading I. 24. *Holderness v. Welling.*

**Pleadings in Equity—Amendments in.**

*See* Practise in Equity.

**Agreement of reference at nisi prius.**

*See* Arbitration, V. 6.

**Consent rule—Lateness of Amendment.**

*See* New Trial III. 54.

**Application to add plea on trial in replevin — No power in Judge to compel plaintiff to reply.**

*See Replevin 12.*

## II.

### WRITS—RETURNS.

#### 1—~~Sheriff~~—Return on writ.

Where the Sheriff had under an execution against B., at the suit of A., levied on the goods of C., and returned the execution satisfied, but C., had since recovered the amount from the Sheriff, who was indemnified by A., the Court allowed the execution to be taken from the files of the Court, in order that the Sheriff might amend his return, A. having lost the fruits of his execution. *Ketchum v. Giberson*, 1 Kerr 519.

#### 2—Execution and Judgment—Variance.

On a motion to set aside a judgment and execution on the ground (*inter alia*) that the execution differed in amount from the judgment, a cross application to amend the execution was granted on payment of costs. *Lynott v. Seely*, 1 All. 35.

#### 3—*Ca Sa*.

An application to amend a *ca. sa.* issued sixteen years ago, by inserting a *testatum* clause, will not be granted unless the writ is found on file, or some record of it is produced. *Quære*. Whether such an amendment would be made after such a lapse of time, and after the defendant had been arrested on a second execution, which was also irregular. *Brown v. Partelow*, 3 Kerr 824.

#### 4—Summons—Death of one defendant.

Where one of the persons named as defendant in a suit had died before summons issued, the pleadings were amended by striking out his name, and answer was re-sworn. *See Byers v. Harrigan*, 1 Han. 231.

#### 5—Writ of Inquiry.

If necessary to set out whole declaration in writ—May be amended. *See Practice X. 5.*



## III.

## RECORDS—ROLLS—BAIL—PIECE—RULE.

**1—Nisi Prius Record—Ejectment—No issue.**

If after the jury are sworn in an action of ejectment, it be discovered that there is no issue, the trespass and ejectment being charged on the record to have been committed by the casual ejector instead of the defendant; the proper course is to discharge the jury, and amend the record at Chambers. *Doe dem Andrews v. Seelye*, 3 Kerr 134.

**2—Judgment Roll.**

On a declaration containing five counts, there was a verdict for the plaintiff on the second, and no notice taken of the others. After the expiration of two terms, while a motion for a new trial was pending, the plaintiff entered up judgment on the verdict without any continuances: the defendant brought a writ of error, assigning as grounds, the absence of any finding by the jury on the four counts, and the want of continuances on the roll. The Court allowed the plaintiff to amend the roll by an entry that the jury were discharged from any finding on the other four counts, and also by entering continuances from the return of the *distringas* to the time of signing judgment. *McMillan v. Ritchie*, 2 All. 469.

**3—Nunc pro tunc.**

Where the plaintiff's attorney had accidentally omitted to insert the amount of damages and costs in the judgment roll, but issued execution for the amount, the Court allowed the roll to be amended *nunc pro tunc*; though the defendant (relying upon the omission) had brought an action of trespass against the plaintiff for seizing his property under the execution. *Smith v. Sonea*, 4 All, 266.

**4—Judgment Roll and Execution—Errors.**

*Semble*, That errors in the judgment roll and execution are not sufficient to invalidate a *bona fide* sale made by the sheriff; as they may be amended. *Doe v. Donnelly*, 3 Kerr 66.

**5—Postea.**

If a declaration contains several counts, some of which are bad, and a general verdict is entered on all the counts, the *postea* may afterwards be amended by confining the verdict to the good counts, if the evidence given at the trial was admissable upon them, and it cannot be inferred that any of the evidence or any part of the damages was given distinctly on the bad count. *Milner v. Gilbert*, 1 *All.* 51.

**6—Bail Piece—Right to amend.**

Where the defendants' attorney in preparing a special bail piece by mistake omitted one of the initial letters of the plaintiff's name, but stated the name correctly in the notice of bail, and proceedings were taken against the bail, the Court refused to set aside the recognizance roll on account of the variance between it and the bail piece, and allowed the plaintiff to amend the bail piece by inserting the initial letter, on payment of costs, it appearing that the bail could not have been misled by the mistake, and that no injustice would be done by the amendment. *Estay v. Brown*, 2 *All.* 527.

Such a mistake would have been amendable without consent of the bail, before the Act 14 Vic. ch. 20. A bail piece is a "legal proceeding," within the meaning of that Act. *Semble*, That the bail would have been liable on the recognizance, without amendment, if the facts had been properly suggested in the recognizance roll. *Ibid.*

**7—Consent Rule—Terms of amendment.**

The defendant in ejectment entered into a general consent rule ; at the trial, the Judge directed a verdict for the defendant for all but a small part of the land described, but the jury did not agree, and after the trial, the defendant obtained an order to amend the consent rule by striking out that portion of the land, on the ground that it was included by mistake. *Held*, That as the plaintiff was entitled to a verdict for that part of the land, and consequently to the general costs of the cause, the amendment could only be made on payment of such costs by the defendant. *Doe v. Day*. 3 *All.* 440.

Defendant entitled to verdict on merits on one issue. Finding for defendant on an issue which should have been found for plaintiff, verdict allowed to be amended.

*See Replevin, 5. Baxter v. Johnston.*

#### **Indictment—Amending.**

*See Criminal Law, II. 24. Regina v. Flynn.*

### **IV.**

#### **MISCELLANEOUS.**

##### **1—Alteration of Writ—Refusal to amend.**

Where the plaintiff altered the return day of a writ from the first to the last day of a term, in consequence of which a verdict in his favour was set aside, the Court refused an application to amend the writ by striking out the alteration and restoring it to its original form, though the plaintiff was barred by the statute of limitations from bringing a fresh action. *Barlow v. O'Donnell*, 1 All. 861.

##### **2—Promissory Note—Refusal to amend.**

The declaration in the first and second counts stated a promissory note made by the defendant to the plaintiff 31st March 1841, for £104, and in the third and fourth counts a note dated 9th July 1844, of a similar amount; the note proved was a joint note, made by the defendant and one J. F. E., to the plaintiff, dated 28th February 1842, £104 17s. 1d. Application was made to amend, which was refused. On a rule to set aside the verdict: *Held*, That the note set out was a separate note, and the note proved was a joint note; that if the note had been truly set out the defendant would have had a right to plead in abatement; and therefore the Judge was right in refusing the amendment, and the variance was fatal. *McKeen v. Estabrooks*, 3 Cerr 369.

##### **3—Judge refusing amendment.**

When a Judge at Nisi Prius refuses an amendment, the Court will not review his decision unless they are satisfied injustice has been done by the refusal. *McAllister v. Day*, 4 All. 87.

*Semble*, That an amendment which would introduce a new cause of action, ought not to be allowed. *Ibid*.

#### **4—Name of Parish—Variance.**

A variance in the description of the parish in an action of ejectment may be amended under the act 7 Wm. IV, cap. 14, after the counsel has addressed the jury, and the Judge is not bound to receive new evidence on the part of the defendant, to shew that the parish was not rightly stated after the amendment. *Doe v. Pitt*, 1 All. 385.

#### **5—Adding name—Foreclosure suit.**

Where an amendment was made in a foreclosure suit, by adding plaintiffs after the filing of the bill, the defendant was allowed a month to answer after service of the order to amend, and a copy of the amended bill. *Wright v. Evanson*, 1 Han. 232.

#### **6—Amendments must be moved for.**

The Court will not suggest amendment to pleading, which counsel have not asked for, although by agreement of counsel on both sides, the Court to be at liberty to allow pleadings on either side to be altered to meet case. *Bangor Ins. Co. v. McLeod*, 2 P. & B. 37.

#### **7—Order for Amendment—Costs.**

An indulgence granted to the plaintiff should not be granted at the expense of the other party. Where a party on the trial applied for leave to amend his declaration, and the application was granted and the trial put off—the costs to abide the event of the suit. *Held*, That such an order was improper, that the costs should be paid by the party getting the amendment. *Smith & Gerow*, 2 Pug. 425.

#### **———Suggestion of Amendments—Court will not Suggest.**

See Practise XIV. 18. *Bangor Ins. Co. v. McLeod*.

#### **———Leave given to amend Pleadings — Duty of party to take out rule and serve it.**

See Practise VIII. 20. *Patterson v. Patterson*.

### **A MOTION.**

See University of New Brunswick.

**ANCESTOR AND HEIR.**

*See* Covenant.

**ANCHORAGE.**

*See* By-Law.

**ANSWER IN EQUITY.**

*See* Equity.

**APPEAL.**

*See* Privy Council. *See* Supreme Court in Equity.

**Entry of Appeal.**

*See* Practise V. 3.

**Certiorari—Appeal Lying.**

*See* Certiorari, I. 5-6.

**Judge's order Granting Leave to appeal to Privy Council—Finality of.**

*See* Practise V. 5. *a. Domville v. Keevan.*

**1—From Judge in Equity.**

The Supreme Court has jurisdiction to hear an appeal from the decision of a Judge in Equity, though notice of the grounds of appeal has not been served on the Judge as directed by the Act 17 Vic. cap. 18, sec. 33. *McDade v. Peters, Mich. T. 1871.*

**2—From Probate Court.**

Appeals from the decision of the Probate Courts must be made to the Supreme Court, and not to one Judge sitting in Equity. *Ex parte Roach, Mich. T. 1871.*

**3—Costs.**

When a Judge declines to hear such an appeal for want of jurisdiction, he has no power to give costs to a party appearing to oppose the appeal. *Ibid.*

**4 —Granting further time.**

When in consequence of an appeal having been made to

the wrong tribunal, the time for appealing allowed by 1 Rev. Stat. cap. 136, sec. 46, had expired; the Court granted further time on filing a proper bond for costs, and on paying the opposite party the costs of applying to set aside the appeal. *Ex parte Roach*, Hil. T. 1872.

**5—Cause depending on credibility of witnesses heard before Judge—Finality.**

When a cause was heard *viva voce* before a Judge in Equity, and depended altogether upon the credibility of the respective witnesses, the Court refused to hear an appeal from the Judge's decision. *Smith v. Armstrong*, East. T. 1872.

**6—Decree—Variation or reversal of—Subsequent proceedings.**

If a decree or order of a Judge in Equity is reversed or varied by the Court of Appeal, any subsequent proceedings in the cause take place in the Court below. *McLeod v. Thomas*, East. T. 1871.

**7—Filing Bond—Leave to appeal—Conditions.**

A Judge in Equity refused to hear an appeal from the Probate Court on the ground that he had no jurisdiction, that the appeal should have been made to the Supreme Court. Application was then made to the Supreme Court within six months after the decision in the Probate Court, and leave given to appeal, on which the appellant filed a bond for costs. On application to set aside the order for leave to appeal, on the ground that the affidavits on which it was obtained, were improperly entitled, and that the bond was not in the form required by the 1 Rev. Stat. cap. 136, sec. 46, the appeal was ordered to be heard on the appellant filing a bond conditioned to pay such costs as the Supreme Court should adjudge, and on payment of the costs of the application, though more than six months had elapsed since the decision of the Judge of Probates. *Ex parte Stockton*, 1 Pug. 142.

**8—County Court—Interlocutory Order.**

*Quere*, Whether there is any appeal to the Supreme

Court under the Act 30 Vic. cap. 10, from an interlocutory order of a Judge of a County Court ; but an order absolutely to stay the proceedings in a suit, is a final decision, and may be appealed from. *Hannington v. Stewart*, 1 *Pug.* 242.

### **9—Opinion of Judge.**

An Appeal does not lie from an opinion of a Judge in Equity, there being no order or decree. *Hodge v. Reid*, 2 *Pug.* 26.

### **10—County Court—Order of Judge—Practice.**

Where defendant appealed from a decision of a County Court Judge, and an order was made staying proceedings till judgment was given on the appeal, and the Judge subsequently rescinded that order and gave the plaintiff leave to proceed, which he accordingly did, and signed judgment, the defendant's attorney attending without objection the taxation of costs. *Held*, That the defendant was bound by the order of the Judge of the County Court, and could not, after such order was made, proceed to have the appeal heard. *Fletcher v. Besnard*, 3 *Pug.* 650.

### **11—Insolvent Act of 1869.**

A party appealing from the decision of a Judge of the County Court, under sec. 83 of Insolvent Act of 1869, is bound to shew that all the necessary preliminary steps have been taken. *Hamilton v. Burgeois*, 3 *Pug.* 232.

### **12—Misjoinder.**

An objection that a party was improperly joined as co-plaintiff in a suit in Equity, cannot be raised as a ground of appeal from the decision of the Judge below at the hearing of the cause, but must be disposed of under the 17 and 18 Vic., cap. 18., sub cap. 2., sec. 24, (Consol. Stat. cap. 49, sec. 50.) *Jones & Wife v. Calkin*, 3 *Pug.* 356.

### **13—Questions of Fact—Judgment of Court below on.**

Where the judge of the Court below, whose judgment is appealed from, has had the witnesses before him, and heard their testimony, an appellate tribunal will never interfere with his decision upon a question of fact, unless for an error in it which is overwhelming. *Ibid.*

**14—Judge's Order for Costs.**

*Quere.*—Whether an order for costs made by a Judge of a County Court, is the subject of an appeal under the words, "the decision of the Judge upon any point of law," in the 24th section of the Act, 30 Vic., cap. 10. *Little v. Caie*, 3 *Pug.* 386.

In appeal from County Courts, only such papers as are necessary for the decision of the case should be returned. *Ibid.*

**15—Common School Act—Appeal to Inspector.**

Where the proceedings of a school meeting are void and are a nullity, as in the case of a meeting held at other time than directed by the Common Schools Act, 1871, (Con. Stat. cap. 65, sec. 91) the Inspector cannot entertain an appeal, the proceedings not being held under the Act, otherwise if proceedings were merely irregular; but meeting properly held. *Price v. Erb et al.*, 1 *P. & B.* 708.

**16—Several Grounds of Appeal.**

A County Court Judge improperly set aside an inquisition on the ground of the Jury being seven instead of five, without determining the other grounds of objection which were raised on appeal: this judgment was reversed without the Court considering the other grounds. *Gregory v. McQuade*, 3 *Pug.* 1.

**17** ————On appeal from an order of a County Court Judge refusing a rule for a new trial on the ground of the verdict being contrary to evidence, the court will not interfere with the finding of the Court below. *Hilland v. Hamm*, 1 *P. & B.*, 289.

**18—Certifying Pleadings.**

On an appeal from County Court, the Judge should certify a copy of pleadings. *McIntyre v. McMonagle*, 2 *Pug.* 466.

**19—Time for Appeal—County Court.**

No preliminary order having been made to stay proceed-



ings in suit in order to enable defendant to perfect his appeal, nor bond filed, until after twenty days after decision of Judge, the plaintiff might have signed judgment, but as he did not do so it was held that there was nothing in the Acts 30 Vic. cap. 10, and 33 Vic. cap. 20, to prevent the defendant from appealing after expiration of twenty days from time of Judge's decision, the Judge having after the filing of bond, made an order staying proceedings till judgment should be given on appeal. *Currier v. Crosby*, 3 Pug. 610.

**20—Hearing of Appeal—Discretion of Court as to.**

The Supreme Court has no discretion to refuse to hear appeal in Crown case reserved from County Court, because the defendant has left the Country, and is not under recognizance to appear to receive sentence. When the case is sent up, it is the duty of Court to hear it. *Regina v. Wright*, 1 P. & B., 363.

**21—Refunding deposit money.**

Where on appeal the defendant paid money into Court and then abandoned his appeal, the court directed the money to be paid out to the plaintiff. *New Bruns. Rwy. Co. v. Murray*, 2 P. & B., 412.

**County Court Judge — Order under Insolvent Act of 1869.**

An appeal lies to Supreme Court from order of County Court Judge. See Insolvent Act of 1869. *Skinner, &c., v. McLeod, &c.*, 2 Pug. 131.

**Necessity of shewing that all Preliminary steps have been taken.**

See Insolvent Act of 1869. 26 *Hamilton v. Burgeois*.

**Equity—Order made by Judge—When Appeal should be made from.**

See Insolvent Act of 1869. 9 *McLeod v. Wright*.

**Party electing tribunal bound by its decision.**

See Certiorari 12, *Ex parte Richards*.

**University of New Brunswick—Appeal to Governor from Acts of Senate.**

See University of N. B.

**APPEARANCE.**

**Summons—Defect in, cured by appearance.**

*See Justices of the Peace, IV. 17.*

**Voluntary dispensing with time.**

*See Pleading I. 37.*

**Filing Plea before appearance.**

*See Summary Action 2.*

**Entering Special Bail.**

Entering special bail and giving a notice thereof signed "Attorney for defendant," is a sufficient appearance, without adding express words of appearance. *Fleming v. Shaw, C. Ms. 117.*

**Appearance to Writ.**

*See County Court 12, Curry v. Lawson.*

**Publication in Gazette for Appearance.**

Where writ cannot be served personally, and an order is made for service by publication in Gazette for one week, it seems that the defendant has that week during which he may appear. *Colwell v. Robertson, 1 P. & B. 481.*

**APPOINTMENT OF OFFICER.**

**1—Harbour Master—Holding over Recovery of Fees.**

Where the Justices of the Peace at the General Sessions had always appointed the harbour master annually, including him in the annual list of the parish officers, and had from time to time made change in the list as regarded the office, there being no other minute or warrant of the appointment than the list entered on the Court minutes. *Held*, That the plaintiff, who was so appointed, could not hold over after the year against the defendant, appointed in his place, nor recover from him the fees of office received by the defendant while acting in the office under his appointment: the plaintiff's appointment was either not valid at all, or expired at the termination of his year and the appointment of his successor. *Stewart v. McDonald, 1 Kerr 52.*

**2—Commissioners of Sewerage.**

By the Act 18 Vic. cap. 88, the Common Council of St. John is authorized and empowered to appoint, and also "to remove and re-appoint from time to time, as may be expedient," two Commissioners of Sewerage and Water Supply. *Held*, That the appointment was during the pleasure of the Common Council, and that they were the proper judges whether it was "expedient" to remove the Commissioners. *Ex parte Sears*, 6 All. 225.

**3—Parish Officer—Sessions—Legality of Meeting**

A. was, at a parish meeting, appointed to the office of collector of rates for the parish of W., and a list containing his name with a number of other parish officers was duly certified and attested, and forwarded to the clerk of the peace. On the list being laid before the sessions, a resolution was passed reciting that, whereas a sufficient number of collectors had not been elected for W. (and several other parishes named), resolved that additional collectors be appointed, and K. was appointed an additional collector for the parish of W. On application for *certiorari*, contradictory affidavits were read, those in support of the application stating that A's election was confirmed, while those read on shewing cause stated that the sessions, instead of confirming the election in the usual way, appointed the same persons to the same offices, adding K. to the list. It was also shewn that neither the chairman of the parish meeting, nor the persons who had elected A. had paid their taxes.

*Held* (per Allen, C. J., and Weldon, J.) that by the return of the chairman, A. was collector *de facto*, and while his election stood, the sessions had no power to appoint another collector, the office being full. But per Fisher and Wetmore, J. J., that the obligation of the sessions to confirm the election depended altogether upon the legality of the parish meeting, and that they have the power to enquire into this when the list is laid before them. *Ex parte Renaud*, 3 Pug. 175.

**Fees to Officers appointed to enforce regulations.**

*See Statute 2, Dickie v. Lawson.*

**Request to appoint Appraisers—Necessity of—Covenant to Appraise. Infant Heir.**

*See Covenant 18.*

**Appointment—Without limitation, is an appointment for life.**

*Joplin v. Davidson, Ber. 308.*

———— **Under Medical Act.**

*See Pleading I. 56. Patterson v. Harding.*

———— **Of Directors of Bank.**

*See Bank.*

———— **Of Valuers.**

*See Landlord and Tenant.*

———— **Of Appraisers.**

*See Landlord and Tenant.*

*See Covenant.*

**APPORTIONMENT OF DAMAGES.**

**Trespass on two lots—Claim—Verdict General.**

*See Trespass IV., 6 White v. Smith.*

**APPRAISERS.**

**Necessity of request to appoint.**

*See Covenant, Woods v. Peters.*

**Appointing of.**

*See Landlord and Tenant, V. 2.*

**APPRENTICE.**

**Infant—Conviction.**

A conviction of an indented apprentice for making

brooms contrary to an agreement contained in an indenture which he executed while an infant, is bad. *Regina v. Haws*, 1 *All.* 100.

The provisions of the Rev. Stat. cap. 134, sec. 6, apply to all indentures, whether the apprentice is above or under fourteen years of age, and unless the requisites of that section are complied with, the apprentice is not liable to imprisonment by Justices under the 15th section of the Act. *Harris v. Roulston*, *Trin.* 1 *Pug.* 171.

### **APPROPRIATION OF PAYMENT.**

#### **Dealings with Old and New Firm—Remittances—Application of.**

Defendant being indebted to a firm, of which one of the plaintiffs was a member, after the transfer of the debts and business of that firm to the plaintiffs, continued to deal with and make remittances to the new firm, with a knowledge of the transfer. *Held*, That the jury were warranted in finding that the remittances were intended to be, and were properly applied by the plaintiffs, to pay the debts due the old firm. *Esson v. Dunn*, 5 *All.* 417.

#### **Want of Privity.**

*See* Bills and Notes V. 20.

#### **Set-off.**

*See* Bills and Notes V. 17.

#### **Application by law—Set-off and payment—Right of defendant to show appropriation on cross examination of witnesses.**

*See* Evidence VIII. 7.

#### **Work and Labour—Agreement to appropriate towards rent.**

*See* Assumpsit III. 20, 40, 54.

#### **Money Appropriated.**

*See* Assumpsit III. 35, and Bills and Notes V. 17.

**APPROPRIATION OF PROPERTY.**

*See Contract 25.*

**APPURTENANCES.**

*See Crown Grant.*

**I.****ARBITRATION AND AWARD.****I. SUBMISSION AND REFERENCE.****II. REVOCATION.****III. MATTERS VITIATING AWARD.****IV. SETTING ASIDE AWARD.****V. MISCELLANEOUS.****SUBMISSION AND REFERENCE.**

**1**———A submission to arbitration allowed to be made a rule of the Supreme Court under the Act of Parliament 9 and 10 Wm. III. cap. 15. *Doe dem. Allen v. Murray*, 2 Kerr 359.

**2**———Must be made a rule of Court before moving to set aside award. *Nugent v. Barron*, 2 All. 621.

**3—Enlarging Time.**

When the time for making an award is enlarged by mutual deed of the parties, the effect will be the same as if the enlarged time had been that originally inserted in the submission. *See Ferguson v. Munro*, 2 Kerr 660.

**II.****REVOCATION.****1—Joint Submission—Forfeiture of Bond—Damages.**

One of two persons on the same side may revoke a joint submission to arbitration: and such revocation will be a forfeiture of a joint and several bond by both, conditioned to stand to, obey and perform the award. *Hatheway v. Cliff*, 2 All. 267.

When arbitrators, after a revocation, make an award

which is unimpeached, the amount awarded is a proper measure of damages in an action on the arbitration bond. *Ibid.*

**2—Notice to Arbitrators not to proceed—Party desirous to revoke—Practice.**

On a reference under a rule of Court, notice given by one of the parties to the arbitrators not to proceed, cannot, since the Act 7 Wm. IV., cap. 14. sec. 27, affect the validity of the award. If either party be desirous of revoking the submission, he should apply to a Judge. *Lloyd v. Hoskins*, 1 Kerr 182.

*See Infra V.*

### III.

#### MATTERS VITIATING AWARD.

**1—Matters not included in Submission—Pleading in Bar.**

To debt on a bond conditioned to perform an award, it is a good plea in bar, that part of one entire sum awarded by the arbitrators, arose out of a matter not included in the submission. *Hill v. Coy*, 1 Kerr 187.

**2—Want of Notice.**

Where a question upon a disputed boundary was left to reference, and the arbitrators informed the parties that they would employ a surveyor to make a survey of the land, which they were empowered to do under the terms of the submission, before they made their award; but they nevertheless proceeded to make their award without any such survey, and without any notice that they had changed their intention; the Court set aside their award. *Doe. dem. Allen v. Murray*, 2 Kerr 439.

**3—Award by two without notice to third.**

Where a cause is referred to three arbitrators whose award, or that of any two of whom is to be final, two of these cannot proceed to make an award without giving notice to the third. *Raymond and another v. Luke*, Ber. 116.

**4—Uncertainty.**

An award directing "security to be given on a certain part of the property of A. B." without stating what part, is void for uncertainty. *Burgoyne v. Burgoyne, C. MS.* 120.

**5—Interest—Partiality.**

The Court will not disturb an award made under a rule of reference, on the grounds of interest and partiality in the arbitrators, unless the interest or partiality is very clearly shewn; especially (*per Parker, J.*) where a party after discovering this had an opportunity of applying to a Judge to revoke the submission, of which he has not availed himself. *Lloyd v. Hoskins, 1 Kerr* 132.

**Averment—Condition—Indenture.**

*See* Pleading I. 10.

**5—Amount exceeding Penalty.**

An award is not invalid because the amount awarded exceeds the penalty of the arbitration bond; neither will the recovery be limited to that penalty in an action on the award which proceeds on the mutual submission of the parties. *See Ferguson v. Munro, 2 Kerr* 660.

**7—Arbitrators Awarding distribution of cost—No provision in Agreement for awarding costs.**

An agreement to refer matters in difference between the parties to Arbitration, made no provision respecting the costs of the reference. An award was made stating that the Arbitrator found for plaintiff the sum of \$200 to be paid to him by defendant, plaintiff and defendant each paying their own costs. *Held*, That as the clause that each party should pay his own costs, did not alter the legal effect of the submission, it did not vitiate the award. *Savage v. Stevenson, 2 P. & B.* 150.

**8—Award not following submission.**

By agreement of reference between partners, the Arbitrators were to award as to the division of the partnership property, part of which was real estate, and all matters in dispute relative to the dissolution. The Arbitrators merely



awarded that the defendant should pay the plaintiff a sum of money. *Held*, bad because it did not decide as to the division of the partnership property. *Atkinson v. Potts*, 5 *All.* 262.

#### IV.

##### SETTING ASIDE AWARD.

###### 1—Irregularity of Proceedings.

Where the proceedings of arbitrators had not been strictly regular, and the consequences of sustaining the award would be more serious than those of setting it aside, the Court set it aside, though the affidavits were contradictory,—it being doubtful whether the party had received notice of a meeting. *Brown v. Gurrier*, 2 *All.* 124.

It is necessary to give notice of an adjourned meeting, where the parties are not present at the adjournment. *Quere*, Whether notice of a meeting to the counsel in a cause which is referred, is notice to the party? *Ibid*.

###### 2—Want of Notice—Mutuality.

The defendant having cut lumber on the plaintiff's land, agreed in writing to pay him such sum as two arbitrators should decide—it being understood at the time, that the plaintiff was to show the bounds of his land. The plaintiff afterwards without notice to the defendant, pointed out his boundaries to the arbitrators, who awarded a certain sum due him. *Held*, That the award was bad for the want of the notice. *Therriau v. Therriau*, 4 *All.* 48.

*Quere*, Whether the agreement to refer, being signed by the defendant only, was not bad for want of mutuality? *Ibid*.

###### 3—Not signing within Time.

Under a submission at Nisi Prius to the award of A. B. and C. or any two of them, they agreed upon an award, and it was drawn up, signed by A. and B. and delivered to C. to be signed by him and handed to the parties; C. discovered a mistake to which A. and B. consenting, the award

was corrected and signed by all three, but not within the time limited. The Court refused to give effect to either, *Wilson v. Kerr and Campbell*, Ber. 280.

**4—Arbitrators exceeding power.**

An award made under a rule of reference, set aside on account of arbitrators exceeding their power. See *Campbell v. Wilson*, Ber. 104.

**5—Making award in favor of defendant under rule of reference to ascertain amount due plaintiff—Improper credits.**

When a verdict was taken for the plaintiff for £1000 subject to the award of arbitrators to be agreed upon, and a rule of reference, subsequently drawn up, which after reciting the agreement, directed that the award should be entered on the *postea* as a verdict of the jury,—*Held*, That the award could not be made in favour of the defendant, and that the power of the arbitrators was confined to the *quantum* of damages only. *Held* also, That as the submission was “all matters in the cause,” they could not give the defendant credit for an item which could not come under the head of payment or set off in the cause. *Campbell v. Wilson*, Ber. 104.

**6—Further information after close of evidence.**

When after the evidence had closed, and the attorneys for the parties had left the room, the defendant's attorney made a communication to one of the arbitrators respecting a matter in controversy, in consequence of which the arbitrators obtained further information on the subject, and one of them swore that his decision was materially influenced thereby; an award in favor of the defendant was set aside, though the other arbitrators swore that they were not influenced by the subsequent information. *M'Causland v. Power*, East T. 1872.

**7—Improper reception of evidence.**

Where arbitrators improperly receive evidence *ex parte* the award will be set aside without reference to the probability of their having been influenced by the evidence. *Ibid*.

**8—Swearing witnesses—Waiver.**

An award will not be disturbed where the witnesses were examined without being sworn, although the rule of reference required them to be sworn if the party objecting to the award were present and consented to such examination. *Reilley v. Gillam*, Ber. 120.

**8a**——An award made under a reference at *Nisi Prius* will not be set aside on the ground that witnesses were examined without being sworn if the objection was not taken before the arbitrators. *Seelye v. Kelly*, Hil T. 1827.

**9—Objections—Merits.**

An application to set aside an award will not be sustained on objections going only to the merits. *Forbes v. Lord*, C. Ms. 60.

**10—Discovery of new evidence.**

An award made under a rule of reference at *Nisi Prius*, will not be set aside on the ground of the discovery of material evidence after the award, where the party who speaks as to the discovery of the paper, swears only in general terms, that he had made diligent search, etc., without stating the particular circumstances relating to the search and finding. *Woodward v. Merritt*, C. Ms. 86.

**11—Awarding costs—Vitiating whole award.**

A cause was referred—the costs to abide the event of the award. The defendant admitted that the sum claimed was due at the time of the arbitration, but objected to pay the costs because the action was commenced before the credit expired, and the arbitrators having found this to be the fact, awarded the amount admitted to the plaintiff, and directed that he should pay all the costs. *Held*, It appearing that the award had been made on conditions that the defendant should not be subject to costs, and the whole award not being sustainable, that it was bad altogether. *Emms v. Neill*, 3 All. 498.

**12—Laches.**

The Court will not entertain an application to set aside

an award made under rule of reference, when the award was to be entered on the *postea* as a verdict of a jury when the applicant has been guilty of laches.

*See Foulis v. Kennear, Ber. 26.*

**Setting aside judgment on award for fraud.**

*See Practice VI. 5.*

**13—Time of application to set aside award.**

An application to set aside an award upon a submission made pursuant to the Statute 9 and 10 Wm. 3, cap. 15, must be made before the last day of the term next after the publishing of the award. *Carter v. Adams, 2 All. 211.*

14—A motion to set aside an award under a submission with a clause of consent to make it a rule of Court, must be made before the last day of the term next after the award is published. *Nugent v. Barron, 2 All. 621.*

15—Where an award made under an order of Nisi Prius is entered on the *postea* as a verdict under the Act 12 Vic. cap. 39, an application to set it aside may be made at any time before judgment is signed, if within twenty days after the award is filed with the Clerk of the Circuits. *Brown v. Harding, 3 All. 351.*

**16—Subject to the same rules as motion for new trials.**

Motion to disturb award entered on *postea* as a verdict of jury, must be governed by same rules as motion for new trials.

*See Foulis v. Kennear, Ber. 26.*

**17—Umpire—Joining with Arbitrators.**

Where the submission to arbitration was by mutual bonds, conditioned to abide the award of two arbitrators if made by a certain day; but if they failed to make an award, then to abide by an umpirage to be made on the same day. *Held, That an award made in due time would be valid as the award of the two arbitrators, although the umpire joined with them. Ferguson v. Munro, 2 Kerr 660.*

The name of B. P. was inserted as umpire in the

condition of the defendant's bond, but omitted in that of the plaintiffs, a blank left for his name not having been filled up. *Held*, That the award was not vitiated by B. P. joining with the two arbitrators in making it, although there was no mutual submission to him. *Ibid*.

Arbitrators competent to decide matters of Law.

*See Foulis v. Kinnear, Ber 26.*

### 18—Attachment.

Award must be before Court before an attachment will be granted for non-performance.

*See Marks v. Marks, 3 Kerr 486.*

## V.

### MISCELLANEOUS.

#### 1—Award good in part—Entry on postea.

An action of trover was referred by order of *Nisi Prius*; the arbitrators awarded that the defendant should restore the property to the plaintiff, or pay him £152. *Held*, That the award was good as to the latter alternative, and that the verdict should be entered on the postea for the amount. *Hughson v. White, East. T. 1881.*

#### 2—Operation of award.

In trespass *quare Cl. fregit*, where the legal title to the land was in the defendant who, some time before the action, had brought ejectment against the plaintiff to recover the land, which action was referred to arbitration, and the arbitrators awarded that the present plaintiff was entitled to retain the land as his own property, and that the present defendant should forthwith execute a deed of the land to the plaintiff or his heirs. *Held*, That the award did not operate as a conveyance of the land, and that the defendant was not estopped from setting up his legal title as a defence in this action. *Oliver v. Elliott, 5 All. 216.*

#### 3—Divisible—Affidavit of Arbitrator.

A cause was referred at *Nisi Prius*—the award to be entered on the postea, and costs to abide the event. The

award ordered that defendant should pay plaintiff a certain sum, and that each party should pay his own costs. *Held*, That the award was divisible; that the part relating to the costs could be separated from the rest, and the award entered up as a verdict, with costs. Also, that an affidavit of the arbitrators was inadmissible to shew that if they had known they had no power over the costs, they would have awarded a different amount to the plaintiff. *Hussey v. Ferguson*, *Hil. T.* 1864.

**5—Married woman cannot bind herself by bond to refer.**

A married woman cannot bind herself by bond to refer matters to arbitration, and her coverture is a good defence to an action for non-performance of an award made under such a reference,—there being no mutuality in the submission. *Harper v. Alexander*, 6 *All.* 485.

**5—Reasonable certainty.**

An agreement of reference recited that an action by defendant against plaintiff was pending; that the parties had agreed to refer the action and all claims, etc., between them relating thereto, or growing out of their dealings; that the action should be discontinued, and that the costs of the cause and of the reference should be in the discretion of the arbitrators. The arbitrators awarded that defendant should pay plaintiff £1000, in full payment and satisfaction of all accounts and transactions between them, and in full and final adjustment of all matters in difference; that defendant should pay plaintiff £12, the costs of the reference, and that on payment of these two sums, the parties should be *ipso facto* mutually discharged from all claims and demands which they had against each other. *Held*, That the award was reasonably certain, and in effect decided that each party should pay his own costs of the action. *Adam v. Carter*, *Hil. T.* 1864.

**6—Amendment of Agreement of reference—Refusal to insert clause.**

Where the plaintiff's attorney, in making a fair copy of

an agreement of reference at Nisi Prius, by mistake omitted the clause that the award was to be entered on the *postea* as a verdict, the Court refused to allow that clause to be inserted in the agreement after the plaintiff had caused it to be made a rule of this Court. *Tobin v. Layton*, 2 *All.* 584.

### **7—Costs—Power to award—Postea—Separate actions.**

An action of assumpsit and an action of debt pending between the parties, they agreed to refer them to arbitration—the award to be entered on the *postea* as a verdict, the cost of the causes to abide the event, and the costs of the reference to be in the discretion of the arbitrators. The arbitrators awarded that the action of debt should be discontinued, each party paying his own costs; that £48 were due the plaintiff in the action of assumpsit, and that each party should pay half the costs of the reference—the moiety payable by the defendant to be taxed as costs in the cause. The Court refused to make an order for entering the award for the plaintiff on the *postea* in the action of assumpsit, unless he consented that a verdict should be entered for the defendant in the action of debt. *Abbot v. Abbot*, 4 *All.* 87.

### **8—Power in Judge to order costs—Set off.**

Where a case is referred at Nisi Prius, and judgment on the award is to be entered, the Judge of the court of Nisi Prius may make an order for full costs, where the plaintiff's demand is reduced by set-off; and such order may be made *ex parte*. *Seelye v. Styles*, 3 *All.* 246.

### **9—Referees—When considered as agents of parties in stating accounts.**

Plaintiff being lessee of land, assigned one half of it to the defendant, who entered into a bond to pay the plaintiff for half the buildings, such sum as two arbitrators should determine before a certain day; the arbitrators not having been appointed under the bond, the parties afterwards agreed verbally to refer the valuation to arbitrators, who made an award of the value. *Held*, That the referees were

the agents of the parties to settle the value, and that the plaintiff might recover the amount awarded by them, as an account stated. *Coram v. Wheten*, 4 *All.* 298.

**10—Concurrent Acts—When not considered such.**

An award directed that the defendant should pay the plaintiff a sum of money on a certain day, and that on such payment being made the defendant should be entitled to receive, and the plaintiff should deliver him two parcels of sleepers then lying at L. *Held*, That they were not concurrent acts, and in an action on the award for money, it was not necessary for the plaintiff to aver a readiness to deliver the sleepers. *Hassell v. Wilson*, 1 *All.* 618.

**11—Breach of Bond for performance of award—Particular breach must be stated in the declaration—General allegation is insufficient.**

*See Burgoyne v. Burgoyne*, C. Ms. 120.

**12—Pleading in bar to action on bond or award.**

Any facts which vitiate an award (except misconduct of the arbitrators,) may be pleaded in bar to an action on the arbitration bond, or on the award, though such facts do not appear on the face of the award. *Rideout v. Stickney*, 1 *All.* 350.

**13—Statute—Taking verdict—Time of signing Judgment.**

The Statute 9 and 10 Wm. III. cap. 15, does not apply to references under the Act of Assembly.

It is not necessary that a verdict should be taken *pro forma* to authorize an award to be entered on the *postea*.

*Quere*—Whether judgment can be signed on the *postea* even in term, until the expiration of twenty days after filing the award. *See Brown v. Harding*, 3 *All.* 246.

**14—Notice of adjourned meeting.**

Necessary to give notice of an adjourned meeting when the parties are not present at the adjournment. *Quere*—Whether notice to the counsel in a cause which is referred is notice to the party. *See Brown v. Gurrier*, 2 *All.* 124.



**15—Want of direction as to entering up award.**

Reference to arbitration under Judges order. Costs to abide event ; no direction as to how award to be entered ; no judgment could be entered. *See* Costs 51.

**Counsel Fees.**

*See* Costs 128. *Milmore v. Freese.*

**16—Publication of award—Revocation of authority—Arbitrator's authority to determine rights—Certainty.**

Where cause referred to arbitration and the arbitrator arrives at a conclusion on matters referred to him and reduces such decision to writing, and communicated same to parties, the award is complete and it is too late afterwards to revoke his authority.

An authority to arbitrator to determine whether plaintiff has "any legal or what right in each of said claim or claims, and the nature and extent of such rights" extends to rights legal or equitable in fee, life or years, and whether in possession, remainder or reversion.

Certainty to a common intent is sufficient. *Milner v. Brydges*, 2 P. & B. 87.

**17—Award made—Subsequent action—Staying proceedings.**

The Court will stay action on motion where an award has been made in matters where objections to award are properly questions for Court to determine and not properly determinable by a jury ; and party not compellable to plead the award. *Ib.*

**18—Action on Award—Alleged Fraud.**

A plea setting up fraud on the part of the arbitrators as a defence to an action on the award is bad. A plea that the arbitrators were induced to make the alleged award by the fraud of the plaintiff, his attorney or agent, although it does not necessarily mean fraud on the part of the arbitrators, but that it might be on the part of the plaintiff, but the language of plea being ambiguous and two mean-

ings presenting themselves, that construction must be adopted which is most unfavorable to party pleading ; but by demurring, the plaintiff admits it to be a fact that the arbitrators were induced to make the award by his fraud, and the law not permitting a man to make his own fraud the foundation of an action, the plea was held good on demurrer. *Boultenhouse v. Milner*, 8 *Pug.* 690.

**19—Alleged improper conduct of Arbitrators—Answering affidavits—Attorney drawing award being Attorney of one party.**

Where arbitrators were charged by the plaintiff that in making their award they went in the absence of the plaintiff to the office of the defendants' attorney, and that the defendants' attorney, as he believed, influenced the arbitrators in making their award which charge was distinctly denied that they were influenced by anything other than evidence given before them, and that the judgment was made up solely from the evidence which had been given, and generally negating what the plaintiff says he believed they were influenced by—was held a sufficient answer and that it was not incumbent on the arbitrators to answer minutely to the allegations against them. Upon the allegations, made the arbitrators should not have been called upon to answer, but having answered their answer was sufficient. Arbitrators stand in a different relation from jurors. It is not desirable to employ one of the attorneys of the parties to draw up the award. *Milner ex parte—In re Bollenhouse*, 8 *Pug.* 96.

**Loss of goods after seizure under a. fa. by sheriff—Liability of execution creditor precluding of recovery by arbitration had.**

*See Execution IV. 20, Miller v. Daniel.*

**ARBITRATORS.**

*See Arbitration.*

## ARREST.

**1—Power to Arrest.**

The House of Assembly in this Province has not the power to arrest and imprison the publisher of a libel on a Member of the House, touching his conduct and proceedings in the House. *Hill v. Weldon*, 3 Kerr 1

The publishing of a newspaper containing libellous reflections on Members of the House of Assembly, is not such a breach of the privileges of the Assembly as will justify the arrest of the publisher, and subsequent commitment of him to prison, under the Speaker's warrant, made pursuant to the order of the House. *Ibid.*

No power of arresting, adjudicating, and punishing by imprisonment in such cases belonged to the House of Assembly in Nova Scotia, under the grant made of a General Assembly by King George the Second; nor appertained to the Assembly as a legal or necessary incident to a Colonial Legislature; nor has been obtained by usage and acquiescence; and consequently no such power is vested in the Assembly in new Brunswick from the circumstance of that Province having been formerly included within the bounds of Nova Scotia, neither was it obtained by the grant of a separate Legislature to New Brunswick in 1874. *Ibid.*

Colonial Assemblies are not vested with all the rights and powers of the Houses of Parliament, but such only as are essential to the discharge of their legislative functions. *Ibid.*

*Quære*, Whether the causing a newspaper, containing libellous publications on Members, to be sent into the House of Assembly and distributed among the Members while engaged in their public duties, is such a contempt in the face of the House as would justify the arrest of the offender under the Speaker's warrant, and committing him to prison? An arrest and imprisonment cannot be justified on any such grounds, when it has not been charged as a distinct offence, and mentioned in the warrant of commitment. *Hill v. Weldon*, 3 Kerr 1.

Where an action of trespass has been brought against the Speaker of the House of Assembly for an arrest and imprisonment made under his warrant, if he claims exemption from personal liability in consequence of having acted under the order of the House, when the House had no authority to make the order, he should specially traverse with an *absque hoc*. If he justify generally, that question does not arise. *Ibid*

*Quære*, Whether the order of the House of Assembly will excuse or justify the Speaker in issuing a warrant, which cannot be legally executed by the officer to whom it is directed. *Ibid*.

#### **2—Privilege from.**

A defendant is not exempt from arrest because he has been before arrested and discharged on ground of privilege. *Gilbert v. McLauchlan*, 2 Kerr 633.

**3**—The privilege of members of the House of Assembly from arrest during the session is for forty days, before and after the prorogation or dissolution.

*See Rennie v. Rankin*, 1 All 820.

A member of House of Assembly must be sued by bill and summons. *Ibid*.

#### **4—Sheriff.**

Sheriffs being required by rule of Court (East T. 2, Geo. III,) to attend Court every term, are privileged from arrest when they come to Fredericton during term, and the particular cause of their so coming will not be enquired into. *Scott v. Clark*, *Trin. T.* 1831.

#### **5—Witness—Waiver.**

Applications to discharge defendant on the ground of being privileged as a witness, dismissed with costs, it appearing that he had waived his privilege at the time the arrest took place. *Gillespie v. Forgarty*, 1 Kerr 162.

#### **6—Witness.**

A witness attending *bona fide* before a sheriff's jury, in

proceedings under a writ *de proprietate probanda*, is privileged from arrest; and if he be arrested *redeundo*, and give a bail bond, the Court will order the bail bond to be cancelled. *Burke v. Sutherland*, 1 Kerr 166.

**7—Discharge of defendant by one of several plaintiffs.**

If a defendant in custody on an execution, is discharged by one of several plaintiffs, he cannot be again arrested at the instance of a co-plaintiff. *Andrews v. Clarke*, Ber. 32.

**8—Voluntarily allowing defendant to go at large.**

If a judgment debtor arrested on a *ca. sa.* is voluntarily allowed by the creditor to go at large, he cannot be arrested again on a new *ca. sa.*, and if he should be so arrested, and give bail for the limits, these facts will be a good defence to an action on the limit bond for an escape. See *Andrews v. Dowdall*, (Bond 12.)

**9—Arrest of judgment debtor—Use of criminal process.**

Plaintiff recovered a verdict against defendant, but before judgment was signed, he left the Province and went to Nova Scotia. Plaintiff afterwards made complaint before a Justice of the Peace that the defendant had committed perjury in giving evidence on the action in which the verdict was obtained; upon which a warrant was issued against him, and delivered to a constable, who took it to Nova Scotia, and it having been indorsed there by a Justice of the Peace, the defendant was arrested on it, and brought into this Province, and taken before a Justice of the Peace, who discharged him; he was then arrested on an execution issued on the plaintiff's judgment. *Held*, That unless the plaintiff had fraudulently made use of the criminal process for the purpose of bringing the defendant within the jurisdiction of this Court, the defendant was not privileged from arrest on the execution; and this being denied by the plaintiff, the Court refused to discharge the defendant from custody. *Oulton v. Hewson*, 6 All. 480.

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**10—Affidavit for order to hold to bail—Insufficiency of—Application to Court pending application to Judge.**

An affidavit to hold to bail stated—that certain goods were shipped at Liverpool on board a certain vessel, of which the defendant was master, to be brought to St. John; that the defendant signed a bill of lading to deliver the said goods to the plaintiff at St. John; that the vessel arrived at St. John with only a part of the goods on board; that the defendant informed the plaintiff that he had sold certain goods (describing them) belonging to the plaintiff, of the value, etc. *Held*, That this affidavit disclosed no cause of action; that it was consistent with the statements in it, that the sale of the goods by the master of the vessel was justifiable; and therefore that an order for bail should not have been made. *Nevins v. Coll*, *Hil. T.* 1871.

Where a defendant has applied to a Judge at Chambers to set aside an arrest, on the ground that there is no *actum* clause in the writ, he may afterwards, and while this application is pending, apply to the Court to rescind a Judge's order for bail in the case, on the ground that the affidavit to hold to bail is defective. (Fisher, J., *dissentiente*.) *Ibid*.

**11—Arrest without warrant.**

To justify a private individual in arresting a person on a charge of felony, without a warrant, he must not only make out a reasonable ground of suspicion against such person, but must also prove that a felony has been committed. *Murphy v. Eills*, *East T.* 1871.

**12—Bankrupt.**

A person resident in this Province who has been declared a bankrupt in England under the English Bankruptcy Act, and who has been afterwards arrested here for a debt incurred in this Province, is not entitled to have the bail bond which he has entered into upon such arrest given up and cancelled, upon affidavit that he was on his

way to England to surrender himself to the Commissioners at a day appointed by them when the arrest took place. *The Mayor &c. of St. John v. Lockwood*, 2 Kerr 9.

**13**———A defendant who was in custody on execution at the suit of the plaintiff at the time of the Bankruptcy Act 5 Vic. cap. 48, coming into operation, and who has since been declared a bankrupt under that Act and duly surrendered, is entitled to his discharge from custody under the twenty-fourth section. *Reynolds v. Hanford*, 2 Kerr. 114.

**14**———A certificate under the present English Bankrupt Act is a discharge of debts incurred in this Province, and may be so pleaded in the Provincial Courts; but *Semble*, The certificate cannot be pleaded generally as in England, but the proceedings on which it is founded must be set out. *Jouett v. Lockwood*, 2 Kerr 674.

**15**———Where the defendant was arrested for a debt due on a bond, and it appeared that after the debt was contracted he had become a bankrupt, and received his discharge under the "Bankruptcy (Scotland) Act of 1856," the Court ordered his discharge on his entering a common appearance. *Gilbert v. McLean*, 2 Han. 218.

**16—Discharge by sheriff—No Judge's order.**

A debtor was in the limits when the Act 37 Vic., cap. 7, abolishing imprisonment for debt came into force, which provided that such persons in confinement when Act came into force, who were not liable to be arrested, should be discharged from custody, and was discharged by the sheriff accordingly without any judge's order; upon an action on the limit bond, the Court doubted if more than nominal damages could be received. *Ex parte Dickson*, 3 Pug. 299.

**17—Persons other than constables making arrest.**

Where an offence was committed in the County of G. and warrants were issued for the arrest of the guilty parties, persons from another county who came to assist the

constables of the County of G. in making arrests were held entitled to the same protection as the constables. *Regina v. Charson*, 3 *Pug.* 546.

**Action for Misnomer—Defective execution—Issuing of second execution before return of first.**

*See* Trespass V. S.

**Justification—Process regular.**

*See* Trespass V. 7.

**Arrest under execution from Justice's Court for excessive amount.**

*See* Execution IV. 10.

**Refusing to discharge debtor after payment of debt—Legal determination of suit or discharge by law must be shewn.**

*See* Action at Law IX. 1, 2.

**Application for discharge from arrest on account of defective affidavit.**

*See* Affidavit VI. 15., *McIntosh v. Burnett*.

**Delay in filing affidavit—Discharge of defendant.**

*See* Bail, *Palmer v. Dinsmore*.

## ARREST OF JUDGMENT.

*See* Practice VI.

## ARTICLES.

*See* Shipping Law.

## ASSAULT.

*See* Trespass V., and Criminal Law.

## ASSESSMENT.

I. PARTIES LIABLE FOR.

LAND DAMAGES.

II. PROCEEDINGS.

SCHOOL ASSESSMENTS.

III. MISCELLANEOUS.



## I.

## PARTIES LIABLE FOR.

**1—Corporations** are liable to be assessed under the Parish School Act 21 Vic. cap. 9. *Ex parte The New Brunswick and Canada Railway and Land Co.*, 4 All. 876

**2—Joint Stock Company—Saint John Suspension Bridge Co.**

The Saint John Suspension Bridge Company is not rateable by the Rev. Stat. cap. 58, sec. 17, in the City of Saint John, because it has an office there and the annual meetings for the election of officers is held there. *Ex parte The Saint John Suspension Bridge Company*, 8 All. 190.

If a Joint Stock Company owns real estate in several Parishes, it is rateable under the Rev. Stat. as a resident of that Parish in which its principal business is carried on, and as a non-resident in the other Parishes. *Ibid.*

**3—Parish—No Poor.**

By the Act 8 Geo. IV, cap. 25, all the annual expenses of the York County almshouse are to be assessed on the several parishes mentioned in the Act, according to the number of poor each parish has in the house. *Held*, That a parish having no poor in the house could not be assessed at all. *Re v. Justices of York*, C. Ms. 108.

**4—Upon whom—Owner of Land.**

An assessment made by commissioners of sewers, under 22 Vic. cap. 58, sec. 10, must be upon the owner of the land by name, and not upon the land itself. *The Queen v. The Commissioners, &c., Germantown Lake*, 1 Han. 348.

**5—Railway Company.**

The E. & N. A. Railway Co. purchased land upon which there was a steam mill; part of the land only was used for the purpose of the Railway. *Held*, That the mill not being a part of the land so used, was not exempt from taxation by the Act 38 Vic. cap. 46. *Ex parte The E. & N. American Railway Co., Mich. T.* 1871.

The words "real and personal property" in the first section of the Act are limited and explained by sec. 2. *Ibid.*

#### **6—Lieutenant Governor—Salary of.**

The official salary of the Lieutenant Governor of the Province is not liable to be assessed under the City Charter of Fredericton, 22 Vic. cap. 8, as an income "derived from any trade, profession or calling, within the Province." Wilmot and Ritchie, J. J. *dissentiente*: per Barker, J., that the Lieutenant Governor is not an "inhabitant" of the City within the meaning of the Act. *Ex parte the Hon. A. H. Gordon*, 6 All. 1.

#### **7—Inhabitant—Why not considered such.**

Plaintiff had a house and property in the parish of S. where he generally resided, and where he was assessed as an inhabitant. He held the Government appointment of Commissioner of Works, the office of which was kept in Fredericton, and was attended by him sometimes for a number of days in succession without returning to his house in S. *Held*, That he was not an "inhabitant" of Fredericton, and that his being at the head of his department of Board of Works was not "carrying on business" in Fredericton, which subjected him to be assessed under the Act 26 Vic. cap. 85. *Hatheway v. Cumming*, 6 All. 161.

#### **8—Non-resident.**

A non-resident carrying on business in a Parish, is liable to be assessed on his personal estate under 1 Rev. Stat. cap. 53, sec. 19. *Ex parte McLeod*, 1 Pug. 127.

#### **9—Land Damages—Highways—Assessment, when and how made—Warrant—Commissioners—New application.**

*See Highways 20.*

#### **Damages—Highways.**

*See Highways 23.*

**10—Railway—Damages—Assessment.**

In assessing damages for land taken for railway purposes under the Act 28 Vic. cap. 12, the jury, besides the value of the land taken for the track, may give damages for the inconvenience caused to the owner by the severance of one part of his farm from the other. *Glazier v. Fredericton Branch Railway Co.*, 2 Han. 8.

**11—Subsequent damage.**

The fact that the plaintiff has been paid damages for an alteration of a course of a stream flowing through his land done by Railway Commissioners under the authority of the Act 19 Vic. cap. 17, will not prevent him from recovering damages caused by the subsequent overflowing of his land in consequence of the improper construction of the alteration. *McLeod v. Commissioners E. & N. A. Railway*, 1 Han. 574.

**12—Private covenant as to compensation.**

Where a company was authorized by Act to enter on private property, erect dams and reservoirs, and overflow land for the purpose of obtaining a supply of water on making compensation to the owners of the land, and in case they could not agree, the amount of compensation to be assessed by a jury in a manner directed by the Act, and the Company requiring to overflow land, entered into a covenant with the owner to build a bridge, over the overflowage, and keep it in repair while the overflowing continued. *Held*, That the parties having agreed upon the mode of compensation the statutory remedy by assessment did not apply. *Ryan v. Lockhart*, 1 Pug. 127.

**13—Entering on land—Provisions for compensation—  
Necessary evidence before right to issue writ—  
Agent—Owner—Notices.**

See Joint Stock Company 15. Albert Mining Company.

**14—Assessment—Volunteer taxes.**

A New Brunswick volunteer, who enrolled under 31 Vic. cap. 4, of the Parliament of Canada, is not entitled to

the exemption from City, County and Parish rates and taxes, provided for by the Provincial Act 28 Vic. cap. 1, sec. 17. *Ruel, Chamberlain, &c., v. Hunter*, 1 *Han.* 606.

**15—Taxation in the City of Fredericton—Clerk—  
“Carrying on business.”**

A clerk in the Provincial Secretary's Office in Fredericton, who resides outside the city is not a “person carrying on business” within the meaning of 26 Vic. cap. 35, sec. 20, so as to make him an inhabitant of the city for the purpose of taxation. *Ex parte Smith*, 2 *Pug.* 147.

**16—Income derived from any trade, profession, or calling within the Province, but not from real or personal property—Meaning of words.**

The plaintiff was a grocer doing business in the city of Fredericton. The profits of his business, including the value of his management were \$600 per annum, on which sum he was assessed as upon income. *Held*, That this was not income derivable from personal property, and that it was liable to assessment under 26 Vic. cap. 35. The income of a merchant or grocer derived from his trade, profession, or calling, is not income from real or personal property intended by the Legislature to be exempt. *Sterling v. Mayor, &c., City of Fredericton*, 2 *Pug.* 155.

**17—Foreign Incorporated Company—Fredericton Assessment law—Agent.**

A Company established abroad, carrying on business in Fredericton, from which it derives its income, is liable to assessment. *Byrne ex parte*, 2 *Pug.* 125.

It does not matter that the head office of the Company is in another place in the province, and that the agent may be under the directions of the superintendent there, and tolls are sent to him. *Ib.*

**18—Foreign Corporation—Branch Bank—Income.**

A foreign Banking Corporation having a branch in Saint John, received in the course of the year by its business by such branch \$29,000, but during the same period sustained losses in its business beyond that amount; the

agent of the corporation having disputed his liability to be assessed on income, on a special case stated for opinion of Court. *Held*, That he was properly assessed on whole amount received. *Sullivan et al. Assessors, &c., v. Robinson, Agent, &c.*, 1 P. & B. 431.

**19—Corporation Stock—Persons subscribing for—Contract—Liability to assessments—Subscriber and Stockholder—Necessity for numbering shares—Equality—Sale—Further liability.**

The plaintiff Company was about being organized, and defendant was asked to take stock in it, and subscribed his name to a paper prepared for that purpose, agreeing to take ten shares. *Held*, per Ritchie, C. J., and Allen J., (Weldon, J., *dissentiente*) That this was an offer made by the Company on the one side, and accepted by the defendant on the other, and that a complete contract was formed, which made him liable as a stockholder to assessments, *Held*, also, That it was not necessary that certain shares designated by numbers should be assigned to defendant, to make him liable. The Act of Incorporation of the plaintiff Company, 27 Vic., cap. 48, authorized the directors to make such equal assessments, from time to time on all the shares as they might deem necessary and expedient, the directors in making the first assessment expressly excluded \$250,000 of stock subscribed in the United States. *Held*, 1st. That this was not an equal assessment, and was therefore bad. 2nd, That the Act 30 Vic., cap. 12, which authorized the directors to restrict the assessment to one-half of the stock subscribed, would not justify the assessment altogether excluding any portion of the stock, but at most allowed them to make an equal assessment on all the stock to that extent. 3rd. That this defect was not cured by the Act 32 Vic., cap. 54, and the first assessment was therefore illegal. Nine other assessments were made on defendant's stock, none of which being paid, a notice was given under the Act 32 Vic., cap. 54, which included all the assessments, and a sale was made, after which defendant was sued for the residue of the calls. *Held*, per Ritchie,

C. J., and Allen, J., (*Weldon, J., dissente*) that the fact of the first assessment being unequal did not vitiate the sale, and defendant was liable for the deficiency remaining on the nine assessments, after deducting amount realised from the sale of his shares, with interest and expenses. *European and N. A. Railway Company, &c., v. McLeod.* 3 *Pug.* 8.

**20—Wild land tax—Non-resident carrying on business in parish where land lies.**

By Act 24 Vic. cap. 19, it is provided that there shall be assessed and collected annually the sum of one cent an acre on granted wilderness land ; but it is also declared, that no owner of lands shall be taxed under the provisions of this Act on lands in the parish where he resides. The 1 Rev. Statutes cap. 53, sec. 19, declares that, “for the purposes of assessment, every person carrying on business in any parish shall be deemed an inhabitant thereof.”

*Held*, That, as the Act 24 Vic. pointed out the mode of levying and assessing the tax, the mode of assessment provided by the Revised Statutes was not incorporated in this Act, and that section 19 had no application to it. Besides, the Legislature has used the word “Resident” in a sense different from that of “Inhabitant,” the former having reference to an actual and not a constructive residence. The plaintiff being a non-resident, though doing business in the parish where his land lay, was therefore held not to be exempt from assessment. *Murchie v. The parish of Canterbury*, 2 *Pug.* 188.

**21 Joint Stock Company—Shareholders—Liability for calls—Notice of assessment—Statute—ex post facto—Construction of.**

The Act 32 Vic., cap. 54, passed an amendment of the Act incorporating the European and North American Railway Company for extension from St. John westward, after declaring that it may be doubtful whether the subscribers for stock were liable, and whether any assessments could be made upon them by reason. 1st. Of the whole

of the capital stock not having been subscribed for. 2nd. Because \$50,000 had not been paid in at the time required by the Act, and 3rd. Because it was doubtful whether notices of the calls or assessments had been given in the manner directed by the Act of Incorporation, enacts as follows :—1st. That the subscribers shall be held liable in the same manner and to same extent as if the necessary amounts had been subscribed and paid as required, and as if all assessments made and notices given were made and given according to the terms of the Act of Incorporation, and the notices of assessments which have been given shall be held as having been regularly and lawfully given in full accordance with the requirements of said Act, and the subscribers to the capital stock shall be liable to the assessments and calls made or to be made, in same manner and to same extent as if the necessary amounts had been subscribed for and paid in as required, and as if the notice and notices of calls and assessments had been made and given as required by said Act of Incorporation. The 2nd section legalizes all acts done or ordered to be done by the Company, their officers, etc., in exercise of the powers given by the Act of Incorporation. The 3rd section declares, that to entitle the Company to recover against any subscriber or stockholder, a notice shall be given and published by the President, which notice shall specify the amount of assessment, that is, whether the whole or what part of the subscribed capital stock, and shall require the same to be paid to the treasurer ; and after such publication the Company may recover in the same manner as if the calls for assessments had been regularly made and published or served in accordance with the requirements of the Act of Incorporation. On July 29th, 1869, the following notice, signed by the President of the Company, was published :—" I hereby give notice that the following calls for payment of the capital stock subscribed to the European and North American Railway from St. John westward, is hereby made, viz., a call of nine per cent. of such capital stock ; a further call of eleven per cent. ; a further call of ten per cent. ; a fur-

ther call of ten per cent. ; a further call of ten per cent. ; a further call of ten per cent. ; a further call of ten per cent. ; a further call of ten per cent. ; a further call of ten per cent. ; the said several per centages making the whole amount of the said capital stock subscribed to the said Company. *Held*, per Allen, C. J., and Weldon, J., (Fisher, J. *dissentiente*,) that the notice was not such as the Act required to entitle the Company to sue ; that the Act did not authorize the President to make calls, but merely to give notice of assessments that had already been made by the directors ; and that defendant was not liable. *The European and N. A. Railway Co., v. Dunn*, 8 *Pug.* 820.

**22—Insolvency—Estate of Insolvent—Liability to taxation.**

The Act 31 Vic., cap. 36, making assessments on real estate in the city of St. John, a special lien on the property for two years, applies equally where the owner has made an assignment in insolvency, and such lien continues for two years after the taxes accrued ; but after the expiration of such period the corporation can only rank on the estate for the taxes the same as ordinary creditors.

The estate of an insolvent in the hands of the assignee is liable to taxation. *The Mayor, &c., of St. John v. McLeod, Assignee, &c.*, 1 *P. & B.* 423.

**23—Debentures—Interest on—Party objecting.**

A Town Council authorized by law to assess for interest payable on debentures issued by the Board of School Trustees, has no power to make an assessment for interest on debentures—to be issued.

It is the duty of a party objecting to an assessment to shew *prima facie* that it is wrong. *Ex parte Maher*, 1 *Pug.* 251.

**Commissioners of sewers—Right to assess proprietors of lands.**

*See Commissioners of Sewers.*



## II.

## PROCEEDINGS.

**On Default—Affidavit.**

*See Damages IV.*

**Writ of Inquiry.**

*See Damages V.*

**Limit Bond—Damages—Assessment.**

*See Bond 8, 10, 15.*

**Service of rule for assessing damages—Delay in service.**

*See Practice VI. 14.*

**1—Notice—Parish School Act—Amount.**

Where an assessment is made under the Parish School Act, the assessors must give notice thereof, in the same manner as in cases of assessment for County rates, under 1 Rev. Stat. cap. 53, sec. 12. *Ex parte Street*, 1 Han. 107.

**2—Notice.**

An assessment under the Act relating to sewers in the City of St. John, is not valid unless the notice required by the Rev. Stat. cap. 53, sec. 12, has been given by the assessors; and *Quere*, Whether such assessment can be made until the expiration of thirty days after such notice given. *Regina v. The Mayor of St. John*, 3 All. 361.

An assessment which does not exceed the sum ordered to be levied by more than 10 per cent. is not illegal. *Ibid.*

**3—Calling Meeting—Different objects.**

An application to Trustees to divide a Parish into School districts, and to call a meeting of the inhabitants to determine upon an assessment under the Parish School Act, 21 Vic. cap. 9, may be made at the same time; and if, on the division of the parish, three or more of the applicants are found to be resident freeholders in the district

for which the assessment is required, the trustees may call the meeting without any new application. *Ex parte Yeats*, 4 All. 981.

A poll-tax may be levied under the Parish School Act. *Ibid.*

#### **4—Separate statements—Mixed assessment.**

A warrant directing an assessment for several purposes ; as, for the poor ; for County contingencies ; and for schools ; may be sufficient—provided the amounts required for each object are separately stated. But there must be separate assessments for each object, and if the whole are so blended together that this cannot be ascertained, the assessment is bad. *Ex parte McInerney*, 1 Pug. 227.

If an assessment is ordered by the Sessions the warrant may be issued by the Clerk of the Peace after the Sessions have adjourned. *Ibid.*

#### **5—School assessment—Assessment list—Part defective — Certiorari.**

Where the assessments for schools, and for the County purposes were stated in separate columns in the assessment list, and an objection was made to the legality of the school assessment, a certiorari was granted to bring up that part of the assessment only. *Ex parte Maher*, Hil. T. 1878.

#### **6—Common School Act—Treasurer—Bond.**

It will not invalidate an assessment made under "The Common Schools' Act, 1871," sec. 12, that the County Treasurer has not given a bond, as directed by the Act, to account for the money paid to him as the County School Fund—that part of the Act being directory only. *Ex parte Raymond*, Mich. T. 1872.

#### **7—General Assessment—Severance—Districts.**

A county assessment in aid of Schools, under the 12th sec. of "The Common Schools' Act, 1871," need not be separate from the general County assessment, provided the

several amounts are distinguishable, nor is it necessary, in order to support such an assessment, to shew any division of School districts. *Ex parte Raymond, Hil. T. 1878.*

**8—Common School Act—School purposes—Notifying Council of amount required.**

By Act 22 Vic. cap. 87, the Mayor etc., of St. John, were authorized "on or before the 1st April in each year," to assess the City for certain purposes. By "The Common Schools' Act, 1871," sec. 58, the Board of Trustees was authorized to determine annually the amount required for the support and maintenance of Schools, etc., in the District, and "previous to the order for assessment for general City purposes," notify the Common Council of the amount required, and the Council was to cause the same to be levied and collected at the time of levying and collecting other City taxes. *Held*, That the Act was imperative as to the time of notifying the Common Council of the amount required for School purposes; and therefore, where the general City assessment was ordered on the 5th March, but the Board of Trustees did not notify the Council of the amount required for Schools till the 25th April, an assessment made for the latter purpose was bad. *Ex parte Carvill, 1 Pug. 222.*

**9—School Assessment—Notice—Time—Amount.**

A School assessment under the Act 21 Vic. cap. 9, sec. 15, is bad if thirty days have not elapsed between the publication of notice of the assessment, and the delivery of the warrant to the collector, according to 1 Rev. Stat. cap. 58, sec. 12. Also, if the amount ordered for assessing and collecting exceeds 15 per cent. on the assessment. *Regina v. Jardine, 5 All. 645.*

**10—Corporation—Against whom—Stock—Actual value.**

An assessment against a Joint Stock Corporation must be made against the President or Manager of the Company. *Ex parte the Bank of New Brunswick, 1 Pug. 265.*

Under the Act 22 Vic. cap. 87, sec. 12, the assessment

should be made upon the actual value, and not upon the par value of the Stock of an incorporated Company. *Ibid.*

**Compelling assessment—School Trustees.**

*See* Mandamus 18. *Ex parte Davoe.*

III.

MISCELLANEOUS.

*See* Joint Stock Company.

**1—Amount of assessment.**

An assessment which does not exceed the sum ordered to be levied by 10 per cent. is not illegal. *See Regina v. Mayor of St. John*, 3 All. 361.

**2**———An assessment for poll tax, if not fixed by a particular statute, must be one-eighth of the amount ordered to be assessed according to 1 Rev. Stat. cap. 53, sec. 11. *Ex parte Sharkey*, Mich. T. 1872.

**3—Certiorari to remove—Time of application.**

An application for a *certiorari* to remove an assessment, should be made promptly. Where a party had notice of an assessment in December, and his property was sold under execution for non-payment in February, an application made in Easter term for a *certiorari* to remove the proceedings was refused, though the assessment appeared to have been improperly made. *Ex parte Gerow*, 4 All. 269.

**4—General Sessions—Power to order.**

The General Sessions has no power to order an assessment as for County contingencies, to meet the costs incurred by a party in making, and by the assessors in resisting an application to quash an assessment under the Parish School Act. *Regina v. Assessors of King's*, 1 Han. 520.

**5—Summoning Freeholders—Private road—Justices issuing warrant—Presence of.**

The two Justices who issue the warrant for summoning freeholders to determine on the necessity of a private road under the Highway Act 50 Geo. III, cap. 6, must be present at the assessment of damages by such freeholders. *Pitt v. Lawson and others*, C. Ms. 57.

**6—Commissioners' acts not judicial—Interest.**

The Acts of Commissioners of Sewers appointed under the Act 22 Vic. cap. 53, are not judicial acts; therefore it is no objection to their proceedings to assess the proprietors of land for the purposes of the Act, that they are interested as owners of land in the district assessed. *Ritchie, J. dissentiente. Ex parte Calhoun, 5 All. 454.*

*See Commissioners, same case.*

**7—Contractor voting—Interest.**

K., a commissioner of sewers for the Germantown Lake District, became contractor for the execution of certain work executed under their direction, and afterwards sat and voted with the other commissioners, when they decided that the work had been satisfactorily performed, and ordered an assessment on the land owners to pay for it. *Held, That the assessment was bad. The Queen v. The Commissioners of Germantown Lake, 1 Han. 348.*

**8—Assessment on person who had conveyed land assessed—Change by Commissioners of name—Certiorari refused.**

An assessment was made upon A, as a proprietor of land in the district, it afterwards appearing that he had conveyed the land to B, the commissioners struck out A's name and inserted B's; the Court in the exercise of its discretion refused to grant a certiorari to buy up the assessment on B's application. *Ex parte Calhoun, 5 All. 454.*

As the insertion of B's name did not increase the assessment on any other proprietor of land in the district, it was held to be no ground for quashing the assessment on the application of such other proprietors. *Ibid.*

**9—Refusal of warrant.**

An application for a warrant to summon a jury to assess the damages to the owner of land through which the Saint John Water Company desired to lay pipes, etc., under the authority of the Act 2 Wm. IV. cap. 26, was refused, where it was not shewn that the Company deemed it absolutely necessary to lay down pipes through the land. *Ex parte The Saint John Water Company, Ber. 128.*

**10—Commissioners—Liability—Neglecting to assess.**

*Quære*, Whether Commissioners of Sewers would be liable to an action if they neglected to make assessment required by Act of Assembly. See *Peck v. Robinson*, 2 Kerr 687.

**11—Power of Commissioners—Special Act.**

Under the powers given to the Commissioners of Sewers by the Act 22 Vic. cap. 58, and 1 Rev. Stat. cap. 67, to assess for all expenses of draining, dykeing, etc., they may assess for the expense of purchasing a mill, erecting a dam across a river, making surveys and for interest on money borrowed—(these being necessary for carrying out the objects of the Act)—and for their own fees. *Ex parte Calhoun*, 5 All. 454.

**12—Error—Intention to correct—Certiorari.**

In shewing cause against a rule for certiorari to remove an assessment, the assessors cannot shew that the matter objected to, is an error which they intended to correct; under the 31st sec. of 1 Rev. Stat. cap. 58, unless the error has been corrected, the certiorari will issue. *Ex parte McGarr*, Hil. T. 1878.

**13—Jury of Inquiry—No return of panel.**

Sheriff not returning any panel on the writ; damages assessed by a jury summoned to try issues at the assizes no good ground for setting aside assessment. See *Wheeler v. Gove*, 1 Kerr 580.

**14—Rector—Rents of Glebe—Liability to Assessment.**

Under the Act 26 Vic. cap. 35, which exempts from taxation the income of the inhabitants of Fredericton, derived from real or personal property, the Rector of the Parish is not liable to be assessed upon the income derived from the rents of his Glebe. *Lee v. Mayor of Fredericton*, East. T. 1878.

**Promissory note given for amount of assessment.**

See Bills and Notes I. 9.

**Interest—Instalment—Calls— Interest not allowed on assessment where Act silent as to.**

*See* Interest 2.

**Assessment of Damages.**

*See* Bond.

**Judgment by default—Damages—Inquiry—Venire Set-  
ting aside Assessment.**

*See* Practise VI.

**Assent—Novation.**

*See* Assumpsit III. 54.

### ASSETS.

*See* Executors and Administrators.

### ASSIGNEE.

**Of Judgment—Attorney claiming as such.**

*See* Attorney III. 7, 9.

**Of Bankrupt.**

*See* Bankrupt.

**Of Bail Bond—Executor of—Suing—Evidence.**

*See* Bond 15.

**Of Limit Bond.**

*See* Bond 2.

**Of Covenant binding Assignee.**

*See* Covenant 7.

**Rights of—Breach of warranty.**

*See* Covenant 4.

**Of Policy of Insurance—Consideration**

*See* Pleading I. 39.

**Of Term—Deed—Project Evidence.**

*See* Landlord and Tenant VI. 2.

**Of License.**

*See License, 2, 3.*

**Of Mortgage—Ejectment—Defence.**

*See Mortgage 3.*

**Of Replevin Bond—Deputy—Delivery.**

*See Bond 18.*

**Of Lease—Action by Assignee of a Lease against lessors on covenants to pay for improvements, plaintiff entitled to interest on amount appraised from time it became payable.**

*See Landlord and Tenant VI. 2.*

**ASSIGNMENT.**

**Recognition of—Third Party.**

*See Chose in Action.*

**Acceptance of Rent—Recognition of Assignee**

*See Landlord and Tenant 14.*

**By Partner—Assent of Co-partner.**

*See Deed IV. 1.*

**Offer to assign—Bona fides—Notice.**

*See Insolvent Debtor 5.*

**In Trust—Creditors.**

*See Insolvent Debtor 5.*

**Of License to cut timber.**

*See License.*

**By parol—To dig minerals.**

*See License.*

**Of Land, without debt.**

*See Mortgage, 1, 2.*

**Of Premises—Mortgage debt**

*See Mortgage 1, 2.*



**Of Mortgage—Vesting of Power of Sale—Rights**

*See* Mortgage 13.

**Of Deed—Creditors not parties to—Bona fide.**

*See* Deed III. 1.

**Trustee, also Creditor.**

*See* Deed III. 4.

**Assignment under Insolvent Act.**

*See* Insolvent Act.

**Of Replevin Bond.**

*See* Bond 21.

**Of lease—Exceptions obstructing light.**

*See* Action on the case IV. 4.

**1—Of Goods—Defeating Execution—Consideration—  
Delivery and Acceptance—Evidence.**

An assignment of goods is not necessarily void, though the intent and effect of it may be to defeat an execution, if the assignment be made *bona fide* for the benefit of other particular creditors, and there be a delivery and acceptance of such goods under the assignment before the execution is delivered to the Sheriff. *Quære*, What acts will constitute a delivery and acceptance? *Kinnear v. White*, 2 *Kerr* 285.

It is a good consideration for such assignment, that the assignees were liable as security for certain existing debts of the assignors, and the goods were to be appropriated to the payment of those debts. Proof of the actual payment of the debts is not essential. *Ibid.*

Whether the consideration and transfer be real or fictitious, and whether there have been an actual delivery and acceptance of the goods, are questions for the jury, on the whole evidence. *Ibid.*

Where part of the alleged consideration was interest

money due on a bond to a creditor in Nova Scotia, and a bill of exchange drawn by him on the plaintiff was given in evidence. *Held*, That a contemporaneous letter written by the creditor which specified that the bill was drawn for such interest was admissible in evidence. *Ibid*.

### **2—Previous Assignment—Execution—Bona fides.**

In trespass against the defendant, Sheriff of Northumberland, for taking goods under an execution against P. as his property, which the plaintiff claimed under a previous assignment made by P. to him in payment of a debt; the question whether the transaction was *bona fide* or not being fairly left to the jury, who found for the plaintiff, the Court refused to disturb the verdict. *Doak v. Johnston*, 2 *Kerr* 319.

Declarations of the son of P., in whose possession the plaintiff had left the goods, as to the circumstances of the transfer, were held to have been properly rejected by the Judge at the trial; though the fact of such possession was proper for the consideration of the jury. *Ibid*.

The fact that the assignment was made to the plaintiff with intent to avoid an execution, does not in point of law make it void, if it be *bona fide*, and for a valid consideration. *Ibid*.

### **3—Of Lease—Privity of Estate—Covenant—Reversion—Action of Covenant.**

Action of covenant by assignee of lessee against lessor on a lease made of land for eleven years, from 1st February 1830, on the usual Provincial building covenant, for not appointing an appraiser to value the buildings after the expiration of the term, and notice to the defendant on the 3rd May, 1843, that the plaintiff had chosen an appraiser on his part, and request then made to the defendant to appoint an appraiser on his part. Plea, that the defendant at and from the end of the term, viz. 1st February, 1841, was willing and ready to appoint an appraiser until the 1st May, 1841, when the defendant granted, bargained and sold

all his right, title and interest in the said land and the buildings and improvements thereon to B and C, after which the said B and C became and are the only persons capable in law to perform the covenants, whereof the plaintiff had notice ; and that B and C had ever since been ready and willing to perform the covenant, but that the plaintiff had not applied to them to appoint an appraiser. *Held*, Bad on demurrer, there being nothing on the record to shew any privity of estate at the time of the assignment, or that the assignment was of a reversionary and not a possessory estate, or that the plaintiff remained in the possession of the demised premises, or that B and C were liable to the performance of the covenant. *Ansley v. Peters*, 2 *Kerr* 598.

*Semble*, The lessor would not be discharged from liability on his personal covenant by assignment of the reversion, although where he assigns during the term, and gives notice thereof to the lessee, application should be made to the assignee to appoint an appraiser. *Ansley v. Peters*, 2 *Kerr* 598.

The lessor by a bargain and sale of the land after the expiration of the term, does not incapacitate himself from the performance of the covenant, as he may still pay the appraised value : if he were incapacitated, the bargain and sale after the term and before appraisalment would be a breach of the covenant. *Ibid*.

#### **4—By Deed—Property passing by.**

The defendant had in his possession as a pond keeper timber belonging to H. who, while it was in the defendant's possession, made a general assignment of his property by deed to the plaintiff. *Held*, that this was an assignment of the *property* in the timber, and not merely of a *chose in action*, and that the plaintiff, after tendering the amount of the defendant's lien on the timber, might maintain trover against him. *Jack v. Eagles* 2 *All.* 95.

#### **5—Policy of Insurance—Invalid assignment.**

Plaintiff, whose stock of goods in his store was insured by

defendants by a policy under seal, sold them to A., taking notes in payment. Subsequently, at the office of defendants' agent, and by his consent, he endorsed on the policy that he thereby assigned it to A., having sold him the goods. This assignment was entered on defendants' books, but not made under seal, and A. was not informed of it. The first note being unpaid, plaintiff, by consent of A., took back the goods, and possession of the store. They were afterwards consumed by fire, *Held*, That the assignment on the policy was invalid, and that plaintiff could recover under the policy for the loss. *Weldon, J., dissente; Fisher, J., dubitante. Crozier v. The Phoenix Insurance Co., 2 Han. 200.*

#### **6—Executor—Mortgage land of Testator.**

An executor cannot assign the legal estate in land mortgaged in fee to his testator, unless the land is devised to him. Without such devise, his assignment will only operate as a transfer of the mortgage debt. An assignment of a mortgage by an executor is not admissible in evidence without proof of the probate. *See Doe v. Hanson, 8 All. 427.*

#### **7—Of Administration Bond.**

In an application to put an administration bond in suit, the Court will not determine whether there has been a breach of the bond. If the applicant makes out a *prima facie* case of breach, and that he is a proper person to sue for it, he is entitled to an assignment. *In re Hunter, 1 Han. 233.*

8—An assignment will not be refused, though the bond varies from the form given by the Act,—the variance being slight. *Ibid.*

### **ASSUMPSIT.**

- I. GENERALLY.
- II. PARTIES.
- III. MONEY COUNTS.
  - a Account Stated.
  - b Money Had and Received.

- c* Money Lent.
- d* Quantum Meruit.
- e* Indebitatus Assumpsit.  
Goods Bargained and Sold.
- g* Money Paid.

#### IV. MISCELLANEOUS.

##### I.

##### GENERALLY.

##### **Action—By and against whom Maintainable.**

*See* Action at Law IX.

##### **Right to Action.**

*See* Action at Law IV.

##### **For what Maintainable.**

*See* Action at Law X.

##### **Rescinding Contract.**

*See* Action at Law V.

##### **Remedy—Suspension of.**

*See* Action at Law VI.

##### **Action before Expiration of Credit.**

*See* Action at Law VII.

##### **Foreign Judgment—Assumpsit Maintainable upon.**

*See* Action at Law X.

##### **Magistrate's Court Judgment.**

*See* Action at Law X.

##### **Former Recovery.**

*See* Action at Law VIII.

##### **1—Breach of Agreement.**

By agreement between the plaintiff and defendant, the latter undertook to manufacture and deliver to the plaintiff by a certain time 200,000 feet of deals, and the plain-

tiff agreed to advance to the defendant twenty shillings per thousand feet for all the deals delivered, but not to advance more than £50 over the quantity delivered; that the plaintiff should dispose of the deals and account to the defendant for the proceeds, the gain or loss to be divided equally, and the defendant's portion of the proceeds to be deducted from his private account with the plaintiff. The plaintiff advanced £200 to the defendant, who only delivered 74,000 feet of deals, which the defendant shipped to Scotland, where they remained unsold. *Held*, That the defendant was liable for breach of his agreement, and that the plaintiff's remedy was not suspended until the deals delivered were sold, but that he might recover the amount of the private account and the surplus advances as liquidated damages. *Lock v. Purdon*, 2 *All.* 38.

*Held also*, That any failure on the plaintiff's part in selling the deals did not affect the defendant's liability for breach of his agreement. *Ibid.*

**2—Mortgaged debt—Settlement of Accounts—Covenant Existing.**

Defendant being indebted to plaintiff for supplies advanced to build a ship, and requiring further advances, mortgaged the ship to the plaintiff in September, 1857, for £10,000, and covenanted to pay the amount due with interest in January, 1858. In November, 1857, the parties settled their accounts, when a balance of £9,749 was found to be due the plaintiff on the advances for which the mortgage was given. *Held*, that assumpsit could not be maintained for this balance, but that action should have been on the covenant. *Jardine v. McCauley*, 5 *All.* 372.

**3—Special averments—Failure in proof of—Recovery under Common Counts.**

The plaintiff and defendant entered into a contract, whereby the defendant agreed to supply the plaintiff with provisions, etc., at stated prices, for teams to be employed by the plaintiff in hauling logs during the winter; the logs to be driven into the boom at B. as early the ensuing spring as the freshet would permit; defendant to make payment for the logs, after deducting his account for supplies,

etc., in three and six months after the logs were driven to the boom. The action was brought before the expiration of six months from the delivery of the logs, and the plaintiff had a general verdict on both the special common counts. *Held*, That having failed to prove the averments in the special counts, the plaintiff could not sustain the verdict on the common counts, not only because the credit had not expired, but because the whole estimate of damages had been based upon the contract. *Campbell v. Todd*, 8 Kerr 171.

**Evidence under Common Counts.**

*See* *Infra* III.

II.

PARTIES.

**Parties.**

*See* Action at Law.

**Corporation—Seal—Agents' Authority—Estoppel.**

*See* Corporation 4.

**Tenants in Common.**

*See* Action at Law.

**Parties—Rescission by.**

*See* Action at Law.

**Parties not in statu quo.**

*See* *Infra* 29.

III.

MONEY COUNTS.

**a—ACCOUNTS STATED.**

**1—Sufficiency of Acknowledgment.**

Upon an agreement made by B. to purchase from C. a quantity of saw logs, which C had previously bought of A, B agreed to pay A £75 from the proceeds of the lumber when it got to market; some time afterwards, upon an

application for payment, B said " he had chartered a vessel, and that A would have his pay, one-half in a fortnight, and the other half in two or three months." *Held*, That A could not recover the £75 on the count for an account stated, although more than three months had elapsed before bringing this action. *Lee v. Howe*, 1 *Kerr*, 569.

2———The defendant having purchased from P a mill, together with a quantity of logs, which had been sold by the plaintiff to P, accepted an order drawn by P on him in the plaintiff's favor for £75, the price of the logs, payable when the deals, into which the logs were to be sawed, were got to market and the proceeds realized; and some time after when the deals were at the market, the order being presented to him for payment, the defendant said he had chartered a vessel to take away the deals, and that he would pay the plaintiff one-half the amount of the order in two or three days and the remainder in two or three months. *Held*, That the plaintiff was entitled to recover the £75 under the account stated. *Lee v. Howe*, 2 *Kerr* 546.

3———An account containing items on both sides, and shewing a balance in favor of the plaintiff, was rendered by him to the defendant, who wrote upon the account a sum of money as a deduction from the balance claimed by the plaintiff. *Held*, That without the deduction there was no admission by the defendant, and that he had only admitted the balance of the account after the deduction. *Held also*, That the plaintiff could not increase this balance by reference to a previous account rendered to him by the defendant, in which a much larger balance was admitted to be due than the plaintiff claimed in this suit, without shewing that one account referred to the other. *Spurr v. Allison*, 8 *Al.* 454.

4———An account containing debits and credits was presented by the plaintiff to the defendant, who admitted it to be correct, but refused to sign it, alleging that there might be other credits to which he was entitled, and for which he required time to consider. *Held*, That this did not prove an account stated. *Harley v. Goodfellow*, 1 *Han.* 335.



5———When A delivered goods to B upon the understanding that B should deliver other goods in exchange, but subsequently A rendered an account to B of the same which B acknowledged to be correct and promised to pay, A may recover therefor under an account stated, notwithstanding his bill of particulars gives the items as the ground of his demand. *Grant v. Aiken & Shaw*, Ber. 259

**6—Demand confined by particulars.**

The plaintiff by his particulars confined his demand to damages for the breach of a special agreement which he failed to prove. *Held*, That he could not give evidence on the account stated of the acknowledgment of a sum due independent of the special agreement, but connected with the transaction to which it related. *Jackman v. Brown*, Mich. T. 1881.

**7—Bill of Exchange admitted under account stated—Pleading.**

If a Bill of Exchange is drawn for balance of account acknowledged to be due to the plaintiff from the drawer,—who has no funds in the drawers' hands,—the plaintiff may recover on the count upon the account stated, if in consequence of not alleging the excuse for non-presentment, he is unable to recover upon the special count. *Emerson v. Gardiner*, 1 All. 451.

8———The payee of a dishonored Bill of Exchange may recover the amount from the drawer in an action on the common counts, if no notice of dishonor has been given. *James v. McLean*, 3 Allen 164.

**9—Payee against maker—Evidence.**

In an action by the payee against the maker of a promissory note, although it is made payable at a particular place, yet it is admissible evidence under the common counts. *Merritt v. Woods*, Ber. 261.

**A promissory note may be given in evidence under Account Stated.**

*See Steadman v. Holstead*, 3 Kerr 385.

**Purchase money in Deed—Admission of.**

*See Estoppel* I. 17.

**Stating Account by Referees—Agents of Parties—When?**

*See* Principal and Agent 16.

**10**———A writing addressed to defendant, requesting him to pay plaintiff £25, half cash and half goods, is not a Bill of Exchange. After payment of part, balance cannot be recovered as on an account stated. *See* Bills and Notes I. 14.

**11—Acceptances—Evidence—Suspension of claim.**

The defendant being indebted to the plaintiff, gave him three documents, intended to be acceptances of the defendant for \$400 each, payable, with current rate of exchange on New York, in five, seven, and ten months from date respectively. *Held*, That they amounted to a special agreement, by which the plaintiff undertook to suspend his claim for payment till the intended acceptances were due; but that after that time, he could sue on the original consideration, or, on an account stated, of which the acceptances were evidence. *Stuart v. Kirk*, 5 *All.* 181.

**11 a—Settlement of Accounts—Evidence—Recovery.**

On a settlement of accounts between the plaintiff and defendant who had been partners, the plaintiff wrote a promissory note in his own favor, which he read to the defendant and requested him to sign; the defendant refused; but admitted he owed the plaintiff the amount. *Held*, 1st. That evidence of the amount admitted by the defendant, was receivable without producing the note. 2nd. That the amount acknowledged could be recovered as an amount stated, though there was no promise to pay. *Hea v. Jones*, 2 *All.* 646.

**11 b—Written order—Acceptance of—Insufficiency of Acknowledgment.**

B being a creditor of A drew upon him a certain order requesting him to pay K "the amount of my account furnished," and delivered it to K. On presentment of the order to A, he wrote on it, "Correct, for say \$75," signing the

initials of his name. *Held*, That this was not evidence of an account stated. The acknowledgment to support account stated must be made with reference to an existing debt due from the defendant to the plaintiff, and it must appear that certain claims existed between the parties concerning which the amount was stated and the balance agreed upon. *Kennedy v. Adams*, 2 *Pug.* 162.

**11 c—Set-off—Contract under seal—Extra work.**

In assumpsit the defendant may shew under a notice of set-off for work and labour, and on account stated that he did work for the plaintiff under a contract under seal; that he did extra work, and that after the completion of the work he settled with the plaintiff, that mutual accounts were stated between them, and that a balance was found to be due to defendant. *Holmes v. Billings*, 5 *All.* 282.

**b—MONEY HAD AND RECEIVED.**

By and against whom action maintainable.

**Stakehold—Horse race.**

*See* Action at Law.

**Harbour Master—Holding over—Fees of Office.**

*See* Appointment of Officer 1.

**12—Attorney—Money collected—Demand.**

The defendant, an attorney, gave the plaintiffs a receipt acknowledging to have received from them several promissory notes for collection, one of the plaintiffs at the same time by letter requesting the defendant to collect the notes. *Held*, 1. That an action for money had and received was properly brought in the name of both plaintiffs, though the notes were in favour of one of them only. *Gilbert v. Palmer*, 1 *All.* 455.

**13** ————A notice to an attorney demanding payment of money received by him in his professional capacity, signed by a person who was not shewn to have had any authority to make the demand, and served by one who had no authority to receive the money, is not a sufficient demand

to support an action for money had and received, though the person who signed the notice was afterwards the attorney in the suit. *Robinson v. Palmer*, 2 *All.* 223.

**14—Legacy—Payment to Executor by party holding.**

H bequeathed to the plaintiff during her life, the profits of his stock and interest in the Saint Stephen's Bank, of which the bank had notice. After the death of H the bank declared a dividend on the stock, which was claimed by and paid to H's executor. *Held*, That in the absence of any agreement by the bank to hold the dividend for the plaintiff, an action for money had and received will not lie, and that payment to the executor discharged the bank. *Hill v. The Saint Stephen's Bank*, 3 *All.* 145.

**15—Master and servant—Earnings for other services.**

The plaintiff hired the defendant by the month to superintend certain work, and to devote the whole of his time to it: during this engagement, and without the plaintiff's knowledge, the defendant worked for another person and received wages. *Held*, [*Ritchie, J. dissentiente*] That the plaintiff could not maintain an action for money had and received against the defendant for such wages, and that the only remedy against him was an action for damages for breach of his contract. *Held*, per *Ritchie, J.* 1. That by the agreement, the time and labour of the defendant became the property of the plaintiff, and that the subsequent hiring by the defendant was a wrong which plaintiffs might waive, and recover the proceeds of the labour in an action for money had and received. 2. That the plaintiff might elect to consider the defendant as his agent in such hiring, adopt his contract, and recover the proceeds as money paid to the plaintiff's use. *Beardsly v. Copeland*, 3 *All.* 458.

**16—Proceeds—Sale of Cargo.**

The plaintiff and one F shipped on board defendant's vessel at Saint Stephen, a cargo of lumber about half of which was the separate property of the plaintiff, kept apart from the rest in the vessel. The lumber was to be carried

to the West Indies, and there sold by the defendant on the separate account of the plaintiff and F, and separate bills of lading were given. It was proved that the cargo had been sold by the defendant, and he admitted that he had received therefor \$2,000. No account of sales or expenses was in evidence. The jury having found a verdict for the plaintiff for £200, on the count for money had and received, a rule *nisi* for a new trial was refused; the Court considering that there was sufficient evidence to support the verdict, although the exact amount due the plaintiff did not appear. *Benson v. Leeman*, 2 Kerr 118.

#### **17—Voluntary Payment—Mistake.**

The plaintiff being sued by the defendant, sent an agent with money to the plaintiff's attorney to pay a certain joint note and costs, supposing it to be the subject of the action; the agent, surprised by the attorney presenting him with a separate note for nearly a similar sum, of a previous date, on signifying there must be some mistake about it, the attorney told him that there would be no further costs of suit for thirty days; but the agent supposing the note shewn him the result of a settlement of the first note, and that there had been a mistake in the dates, paid the separate note with costs, after which the plaintiff was sued on the joint note for the money contained in the first note, and paid it, and brought this action to recover back the money paid on the first note; and shewed circumstances in evidence, upon which the jury found that the first note was paid without consideration, or had been fraudulently detained by the defendant, and was paid by the plaintiff's agent under a mistake of facts. *Held*, That the plaintiff could not recover back the money paid on the first note, as he should have defended the first action. *Johnson v. Brown*, 8 Kerr 264.

#### **18—Public officer—Excessive demand.**

If timber is seized for having been cut on Crown land without license, and the Government instead of proceeding to condemnation, authorize the seizing officer to release it

upon payment of a certain sum per ton, which is paid by the claimant under protest; he cannot maintain an action for money had and received against the officer, because the amount demanded by him exceeds the rate allowed by law on granting licenses to cut timber. *Tibbets v. Allan*, 3 *Kerr* 280.

### 19—Purchaser—Deposit.

A purchaser of land has a right to a title free from incumbrances, and if the vendor is unable to give such a title the purchaser may recover back his deposit. *Scott v. Garnett*, 2 *All.* 624.

### 20—Appropriation of Money.

S being indebted to the plaintiff, and having money in the defendant's hands, directed him to pay the plaintiff's debt, which the defendant agreed to do, the amount having been ascertained and known by the defendant. *Held*, That this was an appropriation of the money by S and a receipt of it by the defendant to the plaintiff's use, for which he could maintain an action for money had and received. *Anderson v. Allison*, 3 *All.* 178.

21———A having consigned goods to the defendants to sell, drew a bill for the amount in favour of B; the defendants refused to accept the bill till the goods were sold, and it was protested for non-acceptance. Soon after drawing the bill, A assigned his property to the plaintiff, who claimed the proceeds of the goods from the defendants, but afterwards wrote them that he found the amount had been appropriated by A to pay a debt to B; and that he (plaintiff) had nothing to do with it. *Held*, 1. That the plaintiff had renounced his claim, and could not recover the proceeds. 2. That his subsequently claiming the goods in consequence of the defendants' refusal to accept the draft, did not destroy the effect of his previous admission. *Cothren v. Kinnear*, 4 *All.* 251.

### 22—Contract rescinded.

The defendant agreed to deliver lumber to the plaintiff

at a certain time, and the plaintiff agreed to make a payment in advance, and to pay the balance on delivery of the lumber; neither party was ready to perform the contract on the day specified for the delivery of the lumber. *Held*, That the contract was rescinded, and that the plaintiff could recover the advances under the count for money had and received. *McCann v. Kirlin*, 8 *All.* 345.

**23—Contract—Failure in performance.**

Where money has been received by a manufacturing corporation under a parol agreement to make payment for the same in articles of their manufacture, which they have failed to perform; an action of assumpsit lies to recover back the money. *Diamond v. The Saint George Lime Company*, 2 *Kerr* 537.

**24—Purchase money—No fraud.**

Where land has been sold and the deed executed, and there is no fraud, the purchaser cannot recover back the purchase money in an action for money had and received, although he may have been evicted by title paramount. The rule of *Caveat emptor* applies, and he should have protected himself by covenants. *Robinson v. Jarvis*, *Hil. T.* 1832.

**25—Tenants in common—For share of Property sold with consent.**

An action for money had and received will lie by one tenant in common against his co-tenant for a moiety of the price of the common property sold by the latter with the consent of the former. *Shaw v. Grant*, *Ber.* 110.

**26—Waiver of Tort—Sale of whole Property without consent.**

If one tenant in common of property, sells the whole, without authority from his co-tenant, the latter may waive the *tort* and recover his share of the price in an action for money had and received. *Doyle v. Taylor*, *Ber.* 201.

**27—Rents and Profits.**

One tenant in common cannot maintain an action for

money had and received against his co-tenant for receiving more than his share of the rents and profits of the joint property, unless there is an account settled and balanced agreed upon, even though the defendant may have acted as bailiff of the other co-tenants in receiving the rents. *Frost et al v. Disbrow*, 1 *Han.* 73.

**28—Infant tenant in common—Disputed account—Balance not agreed to.**

Defendant being a tenant in common with the plaintiffs who were infants, rendered in an account in which he acknowledged a certain sum to be due from them to the plaintiffs, as their share of the rents of the joint property which he had received, the plaintiffs' guardian disputed the correctness of the account, and claimed a much larger sum from the defendant. *Held*, In an action for money had and received, that such balance not having been agreed to, the plaintiffs were not entitled to retain a verdict for that amount. *Ibid.*

**29—Parties not in statu quo.**

The defendant having sold certain real property to the plaintiffs, and received their acceptance for the payment of it, procured an assignment of a mortgage on the property to be made and delivered to the plaintiffs, and further agreed that if one L did not give a deed of the premises, the defendant would proceed against the property either by foreclosure or under the Absconding Debtors Act, so that one of the plaintiffs should receive a clear title to the property; which not being done, nor the assignment registered, the plaintiffs tendered back the assignment, demanded the purchase money, and brought an action for the recovery of it. *Held*, That there being no re-assignment of the mortgage by the plaintiffs, nor an acceptance thereof, the parties were not in *statu quo*, and the action therefore was not sustainable. *Pingree v. Watson*, 3 *Kerr* 251.

**30—Receipt—Promise to account.**

A receipt given by the defendant to the plaintiff for



certain orders, (stating the names of the persons and the amount due from each) "to be accounted in settlement," is not in itself sufficient to support an action for money had and received. *Lee v. Trefethen, Hil. T. 1834.*

**31—Agreement to sell timber—Sale necessary.**

Where timber was delivered to the defendant on an agreement that he should sell it and pay a certain part of the proceeds to the plaintiffs, an action for money had and received will not lie unless the timber has been sold. *Scribner v. Betts, Hil. T. 1833.*

**32—Amount paid on Execution—Land not liable to seizure.**

Defendant recovered judgment against the executors of S for a debt due from their testator, on which execution was issued to levy *de bonis testatoris*, and the real estate of S sold by the Sheriff, and purchased by the plaintiff, who went into possession: the heirs of S afterwards ejected the plaintiff—the real estate not being liable to seizure under the execution. *Held*, That the plaintiff could not recover from the defendant the amount paid to the sheriff for the land, and which he had paid over to the defendant under the execution. *Robinson v. Jarvis, Hil. T. 1832.*

**33—Displacement of Officer—Fees of office.**

Where the General Sessions of a County appointed a Harbour Master under the authority of an act of Assembly which did not limit the tenure of the office, and afterwards displaced him without reasonable cause, and appointed another, the former may bring an action for money had and received to recover the fees of office received by the latter since his appointment. *Joplin v. Davidson, Bert. R. 308.*

**34—Excessive Demand by Seizing officer.**

Where timber was seized for having been cut on Crown land without license, and the government, instead of proceeding to condemnation, authorized the seizing officer to release it on payment of a certain sum per ton, which was

paid by the claimant under protest; he cannot maintain an action for money had and received against the officer, because the amount demanded by him exceeded the rate allowed by law on granting license to cut timber. *Tibbitts v. Allan*, 8 Kerr 280.

**35—Money appropriated.**

The master of a ship owned by the defendant having died, the defendant went on board, took charge of the captain's effects, and locked them up. Among them was a sum of money, which the mate claimed under an alleged agreement with the captain for £2 per month, extra wages; and he took the money as payment,—the defendant not trying to prevent him, but saying, he would let him have it if he could prove the bargain. *Held*, That *prima facie* the money was the private property of the captain, and that the defendant having taken possession of his effects, and afterwards allowed the mate to take the money, was liable to the representative of the captain for money had and received. *Dorman v. Anderson*, 5 All. 215.

**36—No actual receipt of money.**

Plaintiff employed defendant, an attorney, to collect a debt due to plaintiff from A: the defendant did not actually receive the money, but arranged the debt, by allowing the amount in the transfer of a mortgage from A to B, a creditor of the plaintiff. *Held*, That as the defendant had not received money or money's worth, an action for money had and received would not lie. *Neil v. Jack*, 5 All. 237.

**37—Sale of goods—Conversion—Waiver of tort.**

Defendant agreed to deliver deals to H on board a ship sent for the purpose—half the cargo to be paid for in cash: the deals were shipped, and H's agent paid the defendant £20 on account. H became bankrupt in England on the 10th June, and on the 17th June, information of the bankruptcy was received in this country by H's agent, who refused to make any further payment to the defendant, but gave him the bill of lading of the cargo, which he sold for his own benefit. *Held*, That the portion of the cargo

shipped before the 10th June vested in the assignee of H, and that the sale thereof was a conversion for which the assignee might maintain trover, and that he might also waive the *tort* and bring an action for money had and received. *Carrick v. Atkinson*, 5 *All.* 515.

### **38—Fees of Witness—Criminal trial.**

The fees of a witness attending a criminal trial, certified by the presiding Judge under 1 Rev. Stat. cap. 160, sec. 12, may be recovered in an action for money had and received, where it appears that the County Treasurer has sufficient funds in hand to pay the amount. *Mulligan v. Rainsford*, 2 *Han.* 1.

### **39—No receipt of money on check.**

Defendant, at the request of the cashier, and for the benefit of a Bank, bid in certain shares of the Bank-stock, which were advertised for sale. The defendant had no funds in the Bank, but the cashier told him he could draw a check for the amount of the purchase money, which he did, and the amount was paid by the cashier to the seller of the shares, which were then transferred to the defendant. The purchase of its shares by the Bank was contrary to the charter. Defendant offered to transfer the shares to the Bank, but they refused to accept them, and repudiated the whole transaction—the cashier having in the meantime become a defaulter and absconded. *Held*, (Wetmore, J., *dissentiente*) That no money having been received by the defendant on the check, and the money not having been paid for his use, but for the use and benefit of the plaintiffs, they could not recover the amount of the check. *Commercial Bank v. Stephenson*, *Hil. T.* 1872.

### **Corporation—Money received by Mayor—Offset.**

*See Corporation* 16.

### **40—Work and labour—Agreement to credit on rent.**

Plaintiff held land as tenant of defendant under a lease, and by an agreement outside of the lease, he was to do some ditching on the land, which was to be allowed him as a pay-

ment on account of the rent. The ditching was done during the summer, and the defendant afterwards issued a distress warrant for half a year's rent, due on the 1st of May previously, which rent the plaintiff paid. *Held*, That the amount of the ditching was a matter entirely in the knowledge of the plaintiff, and as he had not given the defendant any account of it before the distress issued, he had no means of crediting it on the rent; and that after submitting to the distress, the plaintiff could not maintain an action to recover back the value of the ditching. *Graham v. Gilbert*, 1 *Pug.* 289.

**40 a—Wrong-doer — Property seized — Agent — Money paid over to principal—Defence on trial.**

Defendant wrongfully seized a quantity of shingles belonging to plaintiff, claiming to hold them for stumpage, and plaintiff, to obtain their release, paid the amount claimed. *Held*, That the fact of defendant acting as agent of another person to whom he had paid the money before action, would not protect him, and that he was liable in an action for money had and received. *Held also*, That in such action it was necessary for plaintiff to prove payment of the money, that it was paid under compulsion, and that it was received by the defendant wrongfully, but where on the trial the plaintiff gave some evidence from which a jury might infer that it was received wrongfully, and the defendant rested his case entirely upon the ground that he had received the money as an agent and had paid it over to his principal, and the judge directed the jury to find for the plaintiff; while, if defendant had disputed on the trial the wrongful taking, the judge should have left this question to the jury, yet as he had relied solely on the other objection, he was not entitled to a new trial for misdirection. *Lynch v. Keegan*, 8 *Pug.* 645.

**Waiving tort.**

The right to waive a tort and bring an action *ex contractor* applies only to actions for money had and received.

*See Use and Occupation 4. McCully v. Ward.*

**c—MONEY LENT.**

**41**——Plaintiff having agreed to lend money to D, he drew a note for the amount in the plaintiff's favor and sent it to the defendant, who received the money from the plaintiff and gave her the note—endorsing his own name thereon. The plaintiff swore that she lent the money on the security of the defendant, believing at the time she got the note, that it was the joint note of the defendant and D. *Held*, That the defendant was liable in an action for money lent. *Douglas v. Disbrow*, 4 All. 197.

**d—QUANTUM MERUIT.****42—Contract—Deviations—Acquiescence.**

The plaintiff contracted to build a bridge for the defendants according to a specification, for a certain price, but varied from the contract in many particulars, of which the defendants were aware, but made payments to the plaintiff while the work was going on and very shortly before its completion: the bridge was carried away by the ice, the spring after it was built. *Held*, That the defendants' conduct was evidence of acquiescence in the deviations, and that if the bridge was of any value, the plaintiff was entitled to recover on the common counts. *Foshay v. Baxter*, 1 All. 335.

**43—Work and Labour.**

In an action of *indebitatus assumpsit*, to recover payment for cutting wood and making fires for the House of Assembly, the plaintiff gave in evidence the contingent account of the Assembly, whereby it appeared that a sum of money had been allowed to the defendant for plaintiff's services. *Held*, That the plaintiff was not bound by the amount allowed, but might recover more on the *quantum meruit*. *O'Brien v. Wetmore*, 1 All. 594.

**44—Master and Servant—Stage Driver.**

The plaintiff was employed as a driver by the proprietor of a stage coach. In an action against the master for wages, in which the plaintiff was proved to have received

passage money from persons travelling by the stage, and which the defendant claimed to set-off against the demand for wages, the jury were directed that they might presume the plaintiff had paid over to his master the money so received, in the ordinary course of his employment. *Held*, That without some evidence that such was the course of dealing, the direction was wrong. *McRae v. McBeath*, 8 *Kerr* 446.

*Held also*, That money given to the servant by the owner of a horse, which was led behind the stage on one of its trips, was a mere gratuity to the servant for his trouble in looking after the horse, and that the master had no right to it. *Ibid*.

#### 45—Repairs of Ship—Agent—Liability.

The defendant, having advanced money to D to build a ship, became the registered owner of three-fourths of the ship as a security for his advances, with an agreement that she should be sold in England and his debt paid out of the proceeds of the sale. The ship being at Saint John, and requiring repairs to enable her to go to England, D and the master of the ship employed the plaintiff to do the work, directing him to charge it to the owners. The ship was sent to England and sold, and the defendant got the proceeds. *Held*, That he was liable for the repairs. *Williams v. Wood*, 4 *All.* 362.

#### Extra Work.

*See Contract* 10.

#### 46—Hiring Horse.

A person hiring a horse to perform a journey is not liable for the value of the horse if he dies on the road without the fault of the rider. *Quere*, Whether, in such a case, the owner of the horse is entitled to recover on the *quantum meruit* for the time the defendant had the horse? *See Dickie v. Campbell*, *C. Ms.* 44.

#### 47—Ownership of Property—Liability.

The ownership of property alone will not render the

owner liable to pay for work performed upon it without his request, though he receives it knowing that the work has been performed. *Hartley v. Fisher*, 1 *Al.* 459.

**47 a—Adopting Services—Association—Liability of members.**

Where certain members of an unincorporated association acted under and received the benefit of a constitution and by-laws, framed by a person employed before they became members, they were held liable in an action brought for services performed in preparing such constitution and by-laws. *Ex parte Theal et al*, 2 *Pug.* 349.

**47 b—Adoption of Services—Committee Report.**

Plaintiff, a clerk in the office of the auditor of the city of *St. John*, was employed by him with the knowledge of the Mayor, to make up a list of defaulters in payment of taxes for several years. He prepared the list and sent it to the corporation, together with an account for his services, which account was referred to a committee, who reported, recommending that £—— should be offered the plaintiff in full. The Common Council adopted the report of the committee, and filled in the blank with \$300, declaring that it was to be “without prejudice,” and not as an admission of any indebtedness to the plaintiff. *Held*, That as by Rev. Stat. cap. 119, a corporation may contract without its seal, the defendant had adopted the contract made by the auditor, and that it was properly left to the jury to determine the value of the plaintiff's work. *Girvan v. Mayor, &c., St. John*, 6 *Al.* 411.

**47 c—Special Contract—Non-fulfilment—Property not capable of being returned—Fixtures—Waiver by using.**

In cases of contract to furnish machinery, &c., for certain purposes, if plaintiff, dissatisfied with same as not being according to contract, and the machinery, etc. placed in the plaintiff's building, the necessary using of same before defects are discovered, cannot be considered of itself, an acceptance and waiver of objection to defects; it should

be left to the jury to consider all the circumstances, such as length of time defendant used the same, the complaints he made about it, etc., to infer whether a new contract on plaintiff's part to keep the machinery was made, and to pay what it was worth, though less than contract price, and so to entitle party to recover on the *quantum meruit*. There is a distinction between cases of taking possession of an ordinary chattel, and such other property as machinery placed in a building. *Waterous et al v. Morrow*, 2 P. & B. 11.

**e—INDEBITATUS ASSUMPSIT.**

**48 — Special Contract — Recovery under Common Counts.**

*Indebitatus Assumpsit* to recover the price of a quantity of spruce logs. Written agreement. No further acts remaining to be done by the plaintiff. *Held*, That he could recover on the common counts. *See Leslie v. Hanson*, 1 *Han.* 263.

**49 — Trees severed from freehold—Chattels—Recovery for, under common counts.**

Plaintiff, by a written agreement, sold to defendant for £45, payable part that autumn and balance in one year, the logs on his and his son's land, with the right to cut, for five years. Defendant during the following winter cut and hauled off all the trees suitable for lumber. In the meantime, plaintiff conveyed to his brother, who brought an action of trespass against defendant, for cutting on the land, and recovered damages. *Held*, That the plaintiff was entitled to recover the amount, defendant having bound himself to pay on a certain day, and having got the logs: that the trees being severed, became chattels, and plaintiff's claim being merely a money demand, might be recovered on the common counts. *Murray v. Gilbert*, 1 *Han.* 545.

**f—GOODS BARGAINED AND SOLD.**

**50—Merger—Set-off.**

Plaintiffs proved a demand of £41 against defendant



for goods sold and delivered ; defendant proved a large demand against the plaintiffs, which he promised to settle by his account for the goods, the amount of which was not ascertained at that time. *Held*, That the plaintiffs' demand was not merged in the defendant's, and might be recovered on the common count, there being no notice of set-off. *Cushing v. Goddard*, 3 *All.* 585.

**51—Goods of Plaintiff—Execution against—Arrangement with Creditor.**

Plaintiff sold defendant lumber, part of which was afterwards levied on under execution against the plaintiff, but was given up to the defendant by an arrangement with the judgment creditor, to which the plaintiff was no party. *Held*, That the plaintiff (having a right to sell the lumber) was entitled to recover the price notwithstanding the defendant's arrangement with the judgment creditor. *Johnson v. Crocker*, 4 *All.* 94.

**52—Parties disabling themselves from performance of Contract—Rescission.**

By agreement between the plaintiff and the defendant, the plaintiff was to put up and enclose the frame of a house by a certain day, and the defendant was to make the doors and window sashes out of the plaintiff's lumber, finish the inside of the house, and be paid part in money and part in goods ; the plaintiff furnished the lumber for the doors and sashes, which the defendant made and sold after the expiration of the time for completing the house. The plaintiff never put up the frame. *Held*, That as both parties had disabled themselves from performing it, the contract was rescinded, and the plaintiff could recover on the *quantum meruit* for goods delivered to the defendant under the contract. *Held also*, That as the facts were not disputed, the rescission of the contract was properly decided by the judge. *McAuley v. Geddes*, 4 *All.* 526.

**g—MONEY PAID.**

**53—Contract—Transfer—Unfinished work.**

D having a contract with the defendant to do work on

a railway, transferred his contract to the plaintiff at the defendant's request, on receiving a *bonus* of one penny per yard on the work remaining to be done. Plaintiff gave D his note for the amount, on the undertaking of the defendant that if the plaintiff was prevented from completing the work, the defendant would pay the penny per yard for the amount unfinished. The plaintiff performed part of the work, and left the rest unfinished, at the defendant's request that he should work elsewhere. The plaintiff having paid the amount of the note to D—*Held*, That he could recover it from the defendant, as money paid to his use. *Huckins v. McBean*, 5 *All.* 209.

#### 54—Application of money.

The defendant being indebted to P in the sum of \$1124, requested the plaintiff to pay the amount for him. The plaintiff did not pay the money to P, but, having had dealings with him, and having a demand against him for \$624, placed the \$1124 to his (P's) credit, intending thereby to pay his demand of \$624. Part of the balance was paid to P and part was applied by plaintiff in payment of some liabilities of P. The defendant had no knowledge of P's indebtedness to the plaintiff, or of the mode in which the \$1124 was applied. *Held*, That there was not a novation of the original liability of the defendant, and no extinguishment of the debt due from the defendant to P; therefore the plaintiff could not recover against the defendant for money paid to his use. Per Ritchie, C. J.: That if P had agreed to extinguish his debt against the defendant, and the defendant had notice of the arrangement between the plaintiff and P, and had assented thereto, the action for money paid could have been maintained. Per Allen J.: That if the plaintiff, with the assent of P, had retained the \$624, and paid P the balance of the \$1124, he could have maintained the action—such retainer being equivalent to a payment—and, in that case, no assent of the defendant was necessary. *Harris v. Robertson*, 6 *All.* 496.

## IV.

## MISCELLANEOUS.

**Partners—Liability,**

*See* Partnership 1.

*See* Commissioner of Sewers.

**55—Collector of Taxes—Bond given.**

Assumpsit on the account stated lies against a collector of taxes for a balance admitted by him to be due to his principal, though he has given a bond to the principal to account for moneys collected. *The Mayor, &c., of St. John v. Baldwin*, 3 Kerr 477.

**56 — Pleading — Sterling Currency — Damages — Particulars.**

In an action brought in this Province for the value of goods sold and delivered in England, the plaintiff is entitled to recover such a sum, currency, as would be equivalent to the demand in sterling, according to the rate of exchange between this Province and England at the time of trial. Such an allowance may be recovered under the common counts, for goods sold and delivered without any specific averment that the debt was contracted in sterling money, or any allegation of the relative value of sterling and currency, this is matter of evidence. The particulars not covering such a specific charge were held sufficient, being dated at Liverpool and made up in sterling money. *Campbell v. Wilson*, Ber. 265.

**57 — Special Counts — Particulars — Recovery under Common Counts.**

Where a Declaration contains Special Counts, with a count for money had and received, and the particulars also apply to the latter count, the plaintiff may give evidence under the count for money had and received, though the counsel did not claim to recover on that count in opening the case. *Carrick v. Atkinson* 5 All. 515.

**Work and Labour—Action for Wages as Secretary of Company—Recognition of Officer—Payment by Company of goods ordered by plaintiff.**

*See Evidence I. 24.*

**Assumpsit maintainable for Top Wharfage under Act 5 Vic. cap. 29, sec. 6—Necessary Allegation and Proof.**

*See Wharfage.*

**Denial of Partnership—Inducing belief that Certain persons were in partnership.**

*See Evidence I. 33. Smith v. Gerow.*

**Assumpsit on Case.**

*See Action on the case.*

### ASPORTAVIT.

**Right to maintain trespass de bonis asportatis.**

*See Trespass I. 11, 14, 15, 25, 27.*

### ATTACHMENT.

**1—Against whom—Corporations—Costs—Not granted.**

An attachment cannot be granted against a Corporation for non-payment of costs. *Doe v. Crawford*, 3 All. 266.

**2—Sheriff—Mode of former proceeding.**

Until the general rule of the present term (Hilary, 4 Vic.) the mode of proceeding against a sheriff when out of office, for not bringing in the body of a defendant, was by *distringas* and not by attachment, though the practice has been otherwise in England since the rule of King's Bench, Trinity term, 31 Geo. III. *Henry v. Murphy*, 1 Kerr 207.

**3—Sheriff—When not granted against—Deputation by Party.**

An attachment will not be granted against a sheriff for disobeying rule for returning a writ where special deputy appointed by plaintiff.

*See Sheriff Kingston v. O'Shea, 1 All. 678.*

**4—Sheriff—Delay.**

Delay, sufficiently accounted for, is not a cause for setting aside an attachment against a sheriff where he has not been prejudiced by such delay. *Rex v. Sheriff of Gloucester, Ber. 187.*

**5—Witness.**

An attachment will not be granted for not obeying a subpoena, when the witness is in custody at the time of service. *Regina v. Wetmore, Ber. 244.*

**6—Witness—Wilful Absence—Calling on Subpœna.**

An attachment will not be granted against a witness for not obeying a subpoena unless there is a clear case of contempt; but if his absence is wilful, the court will not, in general, look to the materiality of his testimony. *Maloney v. Morrison, 1 All. 240.*

It is not necessary to show that the witness was called on his subpoena, if it appears by other satisfactory evidence that he did not attend. *Ibid.*

**7—Witness.**

A subpoena to attend on the 10th September, and so from day to day until the cause was tried, was served on the 11th September, and the witness attended for several days, and knew the cause was not tried. *Held, That he was guilty of a contempt in subsequently absenting himself. Johnson v. Williston, 2 All. 171.*

Where a witness accepted the conduct money, and went with the person who served him with the subpoena, and remained at the court for several days, an attachment was granted against him for subsequently absenting himself,

though he and another person swore, in contradiction to the party who served the subpoena, that the original writ was not shown to him, and he also swore that he attended the court as a juror, and left in consequence of ill health, with the intention of returning; his absence appearing to be wilful. *Johnson v. Williams*, 2 *All.* 171.

**8—Witness—Refusal to Attend—Tender of Expenses.**

Where a party is served with a subpoena to attend as a witness, and accepts a sum of money which is tendered to him for his expenses, without objecting to the amount, but refuses to attend on account of his own business, he is liable to an attachment for non-attendance, even though the sum tendered be less than he is entitled to receive under the ordinance of Fees. *Gilbert v. Campbell*, 1 *Han.* 258.

**9—Time of Application—Witness.**

An attachment against a witness for contempt must be applied for at the next term after the contempt committed. *Doe dem. Howe v. Mealley*, *Ber.* 121.

**10—To Enlarge Rule.**

Motion to enlarge rule for an attachment against witness for not obeying subpoena on the ground that he could not be served with the rule, must be made at the term in which rule *nisi* is returnable. *Abbot v. Frink*, 8 *Kerr* 868.

**11—Costs, Refusal to Pay—Agreement for Consent Rule.**

A refusal to pay costs, taxed upon an agreement for a consent rule, will not entitle the opposite party to an attachment for non-payment. The rule should be first drawn up. *Doe v. King*, 8 *Kerr* 178.

**12—Costs—Taxing under Consent Rule.**

In order to entitle a party to an attachment for non-payment of costs under the terms of the consent rule, it is necessary that the costs should be taxed after the consent rule is taken out. *Doe v. King* 8 *Kerr* 296.

**13—Costs—Improper taxation of**

Where the amount of a bill of costs, in which one item

was improperly taxed, had been demanded, an attachment was granted for the balance. *Doe dem. McCullum v. Roe*, 2 All. 143.

**14—Costs—Subsequently incurred.**

The defendant, after a demand of costs under a rule of Court by the plaintiff's attorney, paid the amount to the plaintiff; the attorney afterwards obtained a rule for an attachment for non-payment of the costs, but before the attachment issued, was informed of the payment to the plaintiff. *Held*, That he was not justified in afterwards issuing an attachment for the costs of an affidavit of the demand of payment, and the costs subsequently incurred. *Reg. v. Harper*, 2 All. 433.

**15—Non-payment of Costs—Power of Attorney—Power of Attorney necessary to authorize demand of Costs.**

The attorney in a suit referred by order of *nisi prius* has no authority to demand the amount awarded to his client, and an attachment will not issue. *Tobin v. Layton*, 2 All. 622.

**16—Signature of Affidavit of due Execution of Power of Attorney—Verification.**

Where the affidavit of the due execution of a power of attorney to demand costs under a rule of Court, was made in Nova Scotia before a Judge of the Supreme Court there. —*Held*, That the signature of the Judge must be verified by an affidavit made here, in order to make the demand under such power sufficient to found an attachment. *Fraser v. Harding*, 2 Kerr 290.

**17—Service of copy of Power of Attorney.**

An attachment for non-payment of costs will not be granted, when the costs are demanded under a power of attorney, unless a copy thereof is served upon the party on whom the demand is made. *Gilbert v. Cyr*, Mich. T. 1870.

**18—Power of Attorney—Must be executed by party—Attorney.**

A power of attorney to demand costs must be executed by the party in the suit to whom they are payable. The attorney in the cause has no authority to give a power of attorney for that purpose. *Robicheau v. Turner, Trin. T. 1871.*

**19—Demand of Costs out of Province—Place of demand.**

A demand of costs in Nova Scotia is sufficient to support an application for attachment for non-payment. (Parker, J., *dubitante*.) The place where the demand was made should be stated in the affidavit on which the motion is made, and a rule *nisi* only granted (per Parker, J). *Regina v. Delaney, 6 All. 186.*

**20—Time of Demand.**

The affidavit of the demand of money in order to obtain an attachment must state the day on which the demand was made. *Campbell v. Todd, 1 All. 199.*

**21—Costs—Demand—By whom made.**

An attachment will not be granted for non-payment of costs, unless the demand is made by the party entitled to receive the costs, or his attorney in the cause, or a person authorized under a letter of attorney. *Marsh v. Rose, C. Ms. 105.*

**22—Consent rule—Costs taxed under.**

On motion for an attachment, for not paying costs taxed under a consent rule and a rule for judgment as in case of a non-suit, it is unnecessary to shew that a *ca. sa.* was taken out against the nominal plaintiff, and shewn to the lessor on the demanding of the costs; nor is it requisite that it should appear that final judgment had been entered up; but where the costs are demanded under a power of attorney, the practice requires that a copy of the power of attorney should be served on the party when the costs are demanded. *Doe v. King. 3 Kerr 492.*



**23—On Award—Award must be before Court.**

A rule for an attachment against a party for not performing an award, will not be granted unless the award is brought before the Court. *Marks v. Marks*, 486.

**24—Proceedings against Sheriff—Remedy on Judgment not Lost—When !**

*See Discharge.*

**25—Judge's certificate that there was no reasonable cause to bring action in Supreme Court—Cannot be made a rule of Court to found an Attachment.**

*See Horner v. Crookshank*, 4 All. 875.

**26—Exhibiting Interrogatories—Time.**

If the prosecutor does not exhibit interrogatories against a defendant in custody on an attachment for contempt, a rule will be granted for his discharge unless the interrogatories are filed within four days. *Regina v. Salter*, 4 All. 51.

**27—Married Woman—Marriage of female after verdict in Ejectment—Attachment against married female.**

If a lessor of the plaintiff in ejectment (a female) marries after a verdict for the defendant, an attachment will be granted against her for non-payment of the costs, after due demand. *Doe dem. Sargeant v. Sargeant*, East. T. 1864.

**28—Attachment is in nature of a Mesne Process—Sheriff—Escape—Liability.**

An attachment for non-payment of costs is in the nature of a mesne process, and a sheriff is not liable to an action for the escape of a person so imprisoned unless the plaintiff in the suit has sustained actual damage or delay in consequence of the escape. *Atkinson v. Mitchell*, 6 All. 345.

**29—Election Law—Costs—Attachment.**

Where the Judge who tries an election petition makes an order for costs under the 62nd sect. of the Act 32 Vic. cap. 82, an attachment for non-payment of the costs should be granted by the Judge and not by the Court. *Kay v. Hanington*, 1 Pug. 331.

**30—Enlargement of a rule for Attachment.**

A motion made to enlarge a rule *nisi* for an attachment upon affidavit not very satisfactory, and a majority of the Court so considering, yet, there being a minority in favour of enlarging rule the motion was granted as if an attachment was necessary, it could only go with consent of all the judges, and acquiescence in postponement therefore acquiesced in. *Jones et al. v. Smith*, 2 *Pug.* 45.

**31—Costs—Whether attachment for, will be granted since 37 Vic. cap. 7.**

Attachment for non-payment of costs being a civil proceeding in the nature of an execution, it will not be granted since the Act 37 Vic. cap. 7. (Con. Stat. cap. 38) abolishing imprisonment for debt. *Doe dem. Deveber v. Deveber*, 2 *Pug.* 417.

**32—Contracts made before passing of Act 37 Vic. cap. 7.**

An attachment cannot be issued upon a contract made before the passing of the attachment and abolishment of Imprisonment for Debt Act, 37 Vic. cap. 7. (See however, now, Con. Stat. cap. 42.) It is a general rule that a statute shall not be so construed as to operate retrospectively, unless it is expressly made applicable to past transactions, or the words can have no meaning unless such a construction is adopted. *Smith et al. v. Burke*, 3 *Pug.* 130.

**33—Endorsement on Writ of Attachment—Contempt.**

The endorsement on writ is sufficient if it inform the party what the proceeding against him is for. *Regina v. Knapp*, 1 *P. & B.* 238.

**34—Filing Rule for Attachment.**

It is not necessary that the Rule of Court for an attachment for contempt be taken out and filed in the office of the clerk of the Crown, otherwise if by order of the Judge. *Ib.*

**35—Delay in issuing Attachment.**

Where writ of Attachment was returnable on the first

Tuesday in Michaelmas Term, and alias applied for in the following Hilary Term. *Held*, There was no such delay as to justify Court in setting aside the alias, the defendant not shewing that he was prejudiced by the delay. *Ib*.

### **36—Judge's Order—Attachment Act.**

Where Attachment was issued during the progress of a cause on the order of a Judge under Attachment Act 37 Vic. cap. 7, sec. 68, (Consol. Stat. cap. 42, sec. 65.) *Held*, That the Judge's order must be rescinded before the Attachment could be set aside. *McLellan v. Milmore*, 1 P. & B. 291.

### **37—Dissolving Attachment—Insolvent Act.**

The provision in the Attachment and abolition of Imprisonment for Debt Act 37 Vic. cap 7, (Consol. Stat. cap. 38) providing that in case of an Assignment in Insolvency or the issue of a writ of Attachment, any Attachment, &c., shall be dissolved upon order of Court, if Judge does not apply when the property has been restored to defendant on his giving a bond. *Lloyd v. Allen et al.* 1 P. & B. 452. Overruled, *See* next case.

### **38—Property released on Bond—Delay—Dissolving Attachment.**

*Held*, by Weldon, Fisher, and Wetmore, J. J., (Allen, C. J., and Duff, J., *diss.*) that the 50th section of chapter 42, Consol. Stat., which provides that in case the plaintiff delays for twenty days without the consent of the defendant, or the leave of the Court or Judge in taking any proceeding in the cause, the Attachment may be dissolved unless good cause be shewn for the delay, applies, although the property attached has been restored to the defendant on his giving a bond. (*Lloyd v. Allen*, 1 P. & B. 452 overruled). *Sussex Boot & Shoe Co., v. Breau*, 2 P. & B. 380.

**39**——Where an Attachment has been issued against the property of defendant under the Attachment Act 37 Vic. cap. 7, (Consol. Stat. cap. 38) and a writ of Attachment in Insolvency was subsequently issued against defendant.

*Held*, That as soon as the issue of a writ of Attachment in Insolvency was made to appear to a Judge, the latter was bound under sec. 54 of Act 37 Vic. cap. 7. (Consol. Stat. cap. 38, sec. 55) to dissolve the Attachment, and the regularity of the proceedings in Insolvency could not be enquired into. *Ganter v. Blatchford*, 1 P. & B. 6.

40—Where an Attachment is issued under Act 37 Vic. cap. 7, (Consol. Stat. cap. 38) and the defendant afterwards makes an assignment in Insolvency, the Attachment will be dissolved, without any reference to any rights or remedies which plaintiff may have with regard to costs under the Insolvent Act.

*Quære*—Whether plaintiff has, in such a case, any lien for his costs. *Bullock v. Ring*, 3 Pug. 252.

**41—Execution in Lieu of Attachment under 38 Vic. cap. 4, sec. 22.**

To obtain an execution, in lieu of Attachment under the Act 38 Vic. cap. 4, sec. 22, (Con. Stat. cap. 38, sec. 27) the same facts must be shewn as were formerly necessary to procure an Attachment. *Cotton et al. v. Stack*, 3 Pug. 211.

**42—Delay in Applying—Explanation.**

On an application under the 27 sec. of chapter 38, Consol. Stat. for an order for writs of *fi. fa.* instead of Attachment, it appeared that one rule ordering the plaintiffs to pay the defendant costs, was made in Hilary Term, 38 Vic., and the other in Easter Term, 38 Vic.; that the plaintiffs had not been in Canada since the rules were made, and that the costs had been repeatedly demanded from the plaintiffs' attorney, and from their agent in New Brunswick. *Held*, That the delay in applying was sufficiently explained; that the defendant was entitled to apply for an Attachment, and the order for the issue of the writs of *fi. fa.* was made accordingly. *Cotton et al. v. Stack*, 1 P. & B. 514.

**43—Undertaking by Attorney to pay costs of the day.**

The Court will not make an order under Consol. Stat

cap. 88, sec. 27, for an execution to issue against an attorney for costs which he has undertaken to pay. The person seeking to compel the performance of the undertaking should apply for a rule calling upon the attorney to shew cause why an Attachment should not issue.

Per Weldon, J. The provisions of the Consol. Stat. cap. 28, sec. 27, are confined to the parties to the action. *Gibson and Wife v. The North British and Mercantile Ins. Co.*, 1 P. & B. 571.

**44—Attachment of Debts—Garnishee Act—Corporation—Agent of—Whether money received by, can be Attached by Creditor of Corporation—Deposit of money—Public Officers.**

Money received by an agent of a Corporation is liable to Attachment under the 38 Vic. cap. 5 (Consol. Stat. cap. 43.) by a creditor of the Corporation, though it was received by such agent in the course of his employment, and held by him with the assent of the Corporation, and not adversely.

M. Assistant Superintendent of a Railway Co., deposited in his own name for safe keeping with I. & Co., private bankers, money known to belong to the Company. *Held*, That the relation of debtor and creditor existed between I. & Co., and the Railway Co., and the debt could be attached by a creditor of the latter. The Post Office Inspector held in his hands a check received from the Post Master General of Canada in favor of M., Assistant Superintendent of a Railway Company, to pay an indebtedness of the Government to the Company.

*Held*, That under these circumstances, the Inspector was not liable to Garnishee process at the suit of a creditor of the Company. *Ruel v. The Cons. European & N. A. Railway Company*, 3 Pug. 481.

**45—Surplus Money after Mortgage Sale—Garnishee Act—Debt due or Owning.**

A Building Society held a mortgage against the property of E. Default having been made in payment, the property was sold under foreclosure on 26th February, 1876,

and bid in by M for \$545. The terms of sale were 10 per cent. down, to be forfeited if purchase was not carried out, and balance to be paid on delivery of deed. The purchaser on the day of sale (26th February), paid the solicitor of the Society \$55.00, and the 3rd of March following, he accepted the deed, and paid the balance. The amount due the Society, including expenses, was \$344.47. An attaching order under the Garnishee Act, 38 Vic., cap. 5, was obtained and served on the Society, 1st March, at the instance of F, a creditor of E. *Held*, That as there was not, on the 1st March, when the order was served, any "debt or sum of money due or owing" to E. from the Society, F. was not entitled to judgment against the garnishee.

*Quere*, Whether, if the proceeds of the sale had been actually received by the mortgagee when the order was served, it would have been subject to attachment. *Farmer v. Ellice*, 3 Pug. 486.

**46—Entitling Affidavit to set aside Garnishee Order—  
Affidavit for Garnishee Order—Particularity and  
certainty required.**

An affidavit used by the defendant in an application to set aside or vary a garnishee order, was entitled "William H. Whittemore and Isaac Hurd, plaintiffs, and Edward Herbert, defendant." It was contended that it should have been entitled "William H. Whittemore and Isaac Hurd, primary creditors—Edward Herbert, primary debtor, and Sears and McLellan, Garnishees," and the first sec. of cap. 43 Con. Stat., was relied on. *Held*, That the affidavit was properly entitled, that the first sec. of cap. 43 does not relate to procedure, and that there is no necessity for changing the title of the cause until summons (D) is issued against the garnishee under the tenth section.

In an affidavit for a garnishee order the cause of action must be stated with sufficient particularity to enable the Judge to decide intelligently whether it is a case in which an attachment might issue or not, and with such certainty as would subject the plaintiff to an indictment for perjury if the statement of it should be untrue. *Whittemore v. Herbert*, 2 P. & B. 361.

**47—Cause of Action set out in Affidavit—Variance.**

The plaintiffs, by their agreement, had covenanted and agreed to do, for \$2,500, certain work for the defendant, who was under contract with S to build a row of dwellings, the work to be finished by a day therein fixed, and with leave to the defendant in case the work did not progress satisfactorily, to enter upon the work and complete it, charging the loss thereof against the contract price, and it was thereby understood that such entering and taking possession of the work should not in any way affect the contract, or be construed as a waiver thereof, or as an acceptance of the work done.

The work was not completed at the time fixed, and after notice the defendant took possession of the work and continued it. The plaintiffs had been paid in part, for part of the amount of the contract price—the defendant had accepted orders, and the latter had been served with garnishee orders sufficient to cover any balance on account of work done. The plaintiffs applied for a garnishee order upon an affidavit in which the cause of action was set forth as follows:—"A sum of \$2,228.57 for work and labour done and performed, and materials provided by the plaintiffs for the defendant, and at his request." The County Court Judge granted the order, and it was served upon S and on the defendant's banker. The defendant claimed there was nothing due. On an application to set aside or vary the garnishee order, it was *Held*, That under the facts disclosed the plaintiffs could not sustain an action of *indebitatus assumpsit* for work and labour; that they ought not to be allowed to issue an attaching order for one cause of action and recover upon another, and the garnishee order was accordingly set aside. *Ibid*.

**48—Contingent Liability.**

A plaintiff cannot garnishee moneys not due absolutely to the primary debtor, but depending upon a contingency. *Ibid*.

**49—County Court Judge—Jurisdiction.**

When the amount sworn to in an affidavit for an attach-

ing order is beyond the jurisdiction of a County Court judge, and the affidavit is sufficient, he has no discretion in the matter, but must issue the order in the prescribed form. When the order has been granted, his special authority has been spent, and the order becomes part of the proceedings in the court having jurisdiction, and they have the same inherent power to deal with it that they have to deal with any other process or proceeding in the court. *Ib.*

**50—Controlling Power in Court to Prevent Abuse of Process.**

The court will not allow its process to be used against good faith, and when it appears that an attaching order is used for the purpose of harassing or embarrassing the primary creditor, and not *bona fide*, and for the purpose of securing the debt, the court will vary it or set it aside. *Ib.*

**51—Garnishee—Foreign Corporation—Agency in Province.**

A debt due from a foreign corporation, though having an agent and doing business within this Province, cannot be garnisheed under the Act 38 Vic. cap. 5, (Consol. Stat. cap. 43.) *Ranney v. Morrow*, 3 Pug. 270.

**52—Attachment for Costs ordered to be paid by Court or Judge.**

Since the passing of the Act 38 Vic. cap. 4, (Consol. Stat. cap. 38, secs. 26 and 27,) restoring the power of granting attachments for non-payment of money ordered to be paid by the court or judge, the court will grant attachments for non-payments of costs. *Bishop v. Meehan*, 2 P. & B. 328.

**53—Witness Disobeying Subpœna—Insufficiency of Excuse.**

The fact of the parties to a cause having agreed to settle, or having the suit substantially settled before a witness is called on his subpœna, will not save him from liability to attachment for wilful disobedience to the process. *Doe dem. Cogswell v. Smith*, 3 Pug. 668.



**54—Writ of Possession—Re-entry by Defendant.**

After possession of premises recovered in ejectment has been delivered to the owner by the sheriff and the writ of possession is returned, the power of the court in the suit is at an end, and an attachment will not be granted against party re-entering. *Doe dem Cogswell v. Smith*, 2 *Pug.* 141.

**55—Setting aside Attachment—Delay in Application.**

An application to set aside an attachment issued under 37 *Vic. cap. 7*, (*Con. Stat. cap. 42*.) must be made before appearance. *Robin et al v. Taylor*, 1 *P. & B.* 208. *Kitchen v. Chatham Branch Ry. Co.*, 1 *P. & B.* 215.

**56—Rights of third party—Setting up of.**

The rights of a third to the property attached cannot be set up by the defendant in an application made by him to set aside the attachment. *Kitchen v. Chatham Branch Ry. Co.*, 1 *P. & B.* 215.

**57—Corporation.**

The property of a corporation is subject to attachment under the Act 37 *Vic. cap. 7*, (*Consol. Stat. cap. 42*.) *Kitchen v. Chatham Branch Ry. Co.*, 1 *P. & B.* 215.

**58—Restraining Defendant from bringing Action on Bond.**

The power to restrain defendant from bringing an action on an attachment bond belongs to a judge and not to the court. *Muirhead v. Arbo*, 3 *Pug.* 283.

**Costs—Setting aside Attachment.**

*See Costs V.* 126. *Smith v. Burke.*

**Attachment Law—Affidavits.**

*See Affidavit.*

**Service of writ on agent of defendant—Plaintiff and agent same person—Service set aside.**

*See Practise IV.* 23. *Parrot v. Roberts.*

**Cost of Appeal from decision of Judge in Equity, recoverable by attachment not by execution.**

*See Costs* 79.

*See General Rules* 13.

**ATTORNEY—BARRISTER—COUNSEL.**

- I. ADMISSION.
- II. STRIKING OFF ROLL.
- III. PRIVILEGES.
- IV. UNCERTIFICATED.
- V. AUTHORITY.
- VI. DUTIES.
- VII. LIABILITY.
- VIII. BILL OF COSTS.
- IX. TAXATION OF COSTS.
- X. MISCELLANEOUS.

I.

ADMISSION.

1—See General Rules 15 to 25.

See Acts of Assembly 26 Vic. cap. 23, 30 Vic. cap. 7, 31 Vic. cap. 3.

II.

STRIKING OFF ROLL.

1—Some reason should be given for striking an attorney off the roll, even on his own application. *Ex parte McCully, Gent. one &c.*, 1 Kerr 521.

2—An application to strike an attorney off the roll for misconduct, must be founded on an affidavit adduced on the motion. *Ex parte Palmer*, 2 All. 583.

III.

PRIVILEGES.

1—A defendant who is an attorney of the Supreme Court, cannot be proceeded against summarily for a demand under £20. *Bennet v. Morse*, 2 Kerr 624.

2—Venue.

The plaintiff, an attorney of the Supreme Court, by another attorney sued out a common *capias* against the

defendant, and laid the venue in York county, describing himself in the commencement of the declaration as an attorney of the Supreme Court, and entitled to his privilege as attorney; on the defendant obtaining an order to change the venue to the County of Gloucester, on the usual affidavit that the cause of action arose there, the plaintiff by another order had the venue brought back, on the ground that as an attorney he is entitled to lay and retain his venue in York; and on motion to rescind the last order—*Held*, That the laying or retaining the venue in the county where the court sits (viz. in the County of York,) is a privilege inherent in the attorneys of the Supreme Court of this Province. *Held also*, That this privilege was not waived by the plaintiff's not suing out an attachment of privilege, but as a common person by *capias*; the privileged character having been alleged on the record and allowed to remain there, without any prior objection to its regularity. *Desbrisay v. Baldwin*, 3 Kerr 379.

### 3—Lien.

An attorney has a lien on a judgment obtained by him for his costs, as between attorney and client. *Linton v. Wilson*, 1 Kerr 800.

4—Where the court allowed a judgment to be set-off against another, it must be subject to the attorney's lien generally, and not merely to the extent of the taxed costs in the particular suit. *See Rogers v. Ledden*, 2 Kerr 59.

5—An attorney, who also practises as a barrister, has no legal right to retain for counsel fees, money belonging to his client, without assent. *In re Bayard*, 1 All. 359.

### 6—Services—Fees.

A barrister cannot maintain an action against his client for professional services. *Kerr v. Burns*, 4 All. 604.

*Quere*, Whether such an action would lie on a special contract for a fixed sum, after the service was performed. *Ibid*.

A trial fee, under the Ordinance, is a fee to the counsel, and not to the attorney. *Ib*.

**7—Judgment assigned.**

Attorney has a right to receive the taxed costs of judgment assigned. *See Green v. Hendricks*, 1 Al. 698.

**8—Parties settling suit.**

The parties to a suit have a right to settle it without the consent of the attorney, and he is not justified after notice of the settlement in proceeding with the suit to recover his costs, unless the settlement was collusive for the purpose of defrauding him. *Ex parte Morse*, 3 Kerr 366.

**9—Payment of money—Assignee.**

The court will not compel an attorney, on a summary application, to pay over the proceeds of a judgment to a person claiming as assignee unless his right is clear. *Murray v. Johnston*, 1 Al. 697.

**10—Service of bill upon attorney should, in general, be personal service.**

*See Sayre v. Gilbert*, 2 Kerr, 225.

**11—Barrister.**

A barrister has no legal remedy to recover remuneration for his services. *In re Bayard*, 1 Al. 359.

**12**——A barrister against whom an action is brought has no right to conduct his defence both in person and by counsel. *Robinson v. Palmer*, 2 Al. 228.

**When Judge may refuse to allow Counsel to address Jury.**

*See Trial.*

**Counsel fee on arbitration.**

*See Costs* 123.

## IV.

## UNCERTIFICATED.

**1**—A writ issued by an uncertificated attorney, and all proceedings taken thereunder, will be set aside. *Desbrisay v. Mackay*, 1 Han. 188.

**2**———The proceedings in a suit by an attorney who has not taken out a certificate under the Act 22 Vic. cap. 28, are a nullity ; and the objection is not waived by the defendant's attorney attending the trial of the cause, after knowledge of the omission. *Ryan v. McIntyre*, *Hil. T.* 1870.

### **3—Uncertificated Attorney—County Court.**

An attorney of the Supreme Court may practice in the County Courts, though he may not have taken out a certificate under the Act 22 Vic. cap. 28, (Consol. Stat. cap. 84.) *Voto v. Quinsler*, 2 *Pug.* 492.

### **4—Attorney in cause not allowed fees as witness.**

An attorney in the cause is not entitled to fees as a witness, it being his duty to be in attendance on the trial of the cause. *Jones et al v. Bolsford*, 1 *P. & B.* 581.

## **V.**

### **AUTHORITY.**

#### **1—Written.**

The Act 12 Vic. cap. 40, sec. 15, requiring attorneys to have written authority to sue is not limited to summary actions. If payment has been obtained in a suit with knowledge of the client, it will be presumed in absence of evidence to the contrary, that the attorney had written authority. Either party may apply to stay proceedings in an action brought without authority. *James v. McLean*, 3 *All.* 164.

#### **2—Production of Authority.**

Counsel not required to produce his authority in making a motion before Court. *See In re Hunter*, 1 *Han.* 233.

#### **3—Signing Cognovit.**

An attorney has no authority to sign a Cognovit in a suit without the authority of his client, but his client will be bound by a Cognovit given without his consent, if he makes no objection when informed of it. *McNamee v. O'Brien*, 4 *All.* 548.

**4—Presumption of authority to issue execution.**

Where an attorney issued an execution in the name of the defendant, an attorney residing at a distance from him, and delivered it to the Sheriff, and afterwards attended before a judge to oppose an application to set the execution aside. *Held*, In an action of trespass for taking property under the execution, that in the absence of evidence, to negative the authority and to shew that the defendant did not receive the proceeds of the execution, it might be inferred that the attorney had authority to issue the execution. *Wilson v. Street*, 3 All. 251.

**5—To give Power of Attorney to demand costs.**

Attorney cannot give a power of attorney for his client to demand costs. *See* Attachment 18.

**6—Counsel—Appearance in suit on trial without authority.**

Where no notice of trial was given by plaintiff, and a counsel who had been retained in a former trial, in ignorance of this fact appeared without authority, defendant being absent, and defended, a verdict for the plaintiff was set aside. *See Doherty v. Desbrisay*, 1 Han. 494.

**7—Attorney Compromising Suit—Authority.**

An attorney has a general authority to compromise an action on behalf of his client, provided he acts *bona fide* and reasonably, and within the scope of his authority as an agent to compromise.

An agreement to take a smaller sum as a discharge for a larger, will not impose an obligation on the plaintiffs to accept it. The plaintiffs themselves making such an agreement would not be bound by it. *The Bank of Nova Scotia v. Morrow*, 1 P. & B. 343.

If an attorney enters into a compromise, although contrary to the directions of his client, although the compromise would be *ultra vires* against the client, it would be binding as between the parties, if made reasonably skilful and *bona fide*. *See* same case—judgment of Allen, C. J.

**8—Unauthorized persons employing Attorney to institute proceedings—Setting aside of.**

If persons unconnected with a company, or its duly qualified officers, authorize an action in the name of the company, the client will stay proceedings without costs. *Dewelfe v. Albert Mining Co.*, 2 *Pug.* 260.

## VI.

## DUTIES.

**1**—Implied understanding to pay over money collected, on demand. *See Gilbert v. Palmer*, 1 *All.* 455.

**2—What is a sufficient demand?**

An intimation from a client to his attorney, who has collected money, that the client wishes it paid over, is a sufficient demand to support an action for money had and received. *Gilbert v. Palmer*, 1 *All.* 667.

It is not necessary that the demand should be made at the attorney's residence or place of business, unless he objects on that ground. *Ibid.*

**Duty to communicate to client offer of compromise of suit.**

*See Supersedeas, Jones v. Steves.*

**3—Counsel.**

It is the duty of counsel to see that rules obtained by them are properly entered in the minutes of the Court. *Ex parte Glass*, 2 *All.* 88.

*See Practice in Equity* 21.

**4—Attorney and Client—Right of Client to statement of account and bill of costs.**

A client is entitled to a statement of account from the attorney who has collected money for him and of the attorney's bill of costs.

In case of refusal of the attorney to deliver such statement and bill of costs, the court having authority over its own officers, will compel him to furnish them. *Gunter v. Sharp*, 1 *P. & B.* 286.

**5**———Duty of Attorney to attend court on trial of cause, and he will not be allowed witness's fees. *Jones v. Botsford*, 1 P. & B. 581.

**6**———Duty of Attorney and counsel in a cause to attend court until cause is disposed of. *Bowes v. Sutherland*, 2 Kerr 1.

## VII.

### LIABILITY.

#### **1—For Sheriff's Fees.**

Attorney liable, as well as plaintiff, for Sheriff's fees on executing writ of *ca. sa.* See *Kavanagh v. McPhelim*, 1 Kerr 472.

**2**———Not liable for poundage on execution unless he receives the amount from the defendant, though the defendant has escaped from the limits and his bail has paid the debt and costs to attorney. *Caldwell v. Badger*, 2 All 516.

#### **Not filing papers—Forfeiture of costs.**

See Practise VI. 48 a.

#### **3—Improper Pleading.**

If an attorney, without any assignable reason and without any precedent, adopts a new and unusual mode of pleading, in consequence of which his client suffers loss, the attorney is answerable in an action for negligence. *Carrigan v. Andrews*, 1 All. 485.

#### **4—Issuing Void Writ.**

An attorney is liable over to a sheriff who sustains damages by proceeding under what purports to be a writ of the Court but is not, when the same is put into the sheriff's hands by him. *Johnston v. Winslow*, Ber. 53.

## VIII.

### BILL OF COSTS.

#### **1—Delivery of before action.**

It is not necessary for an attorney to deliver a taxed bill to his client before bringing an action. *Jack v. Clewes*, 3 Kerr 637.



**2**———The Act of Parliament 3 Jac. I, cap. 7, requiring the delivery of an attorney's bill of costs before action brought, extends to this Province, but the Act 2 Geo. II. cap. 28, requiring the delivery a month before action, is not in force here. *James v. McLean*, 3 All. 164.

**3—Signing.**

The Statute 3 Jac. I, cap. 6, requiring attorneys to deliver signed bills of costs to their clients, extends to this Province, and is not affected by its repeal in England by the 6 and 7 Vic. cap. 78. *Kerr v. Burns*, 4 All. 604.

**4**———A general account, including the bill of costs delivered by an attorney to his client, though made out in the handwriting and headed in the name of the attorney, does not amount to a signing of the separate bills under the Statute. *Ibid.*

## IX.

### TAXATION OF COSTS.

**1—Review of—Retaining of money by Attorney.**

The defendant, after a verdict against him, placed in his attorney's hands £22, to be applied in part payment of the judgment; the attorney retained the money, and made an application to review the taxation of costs, which was refused with costs, because the defendant had in the mean time paid the amount of debt and costs to the sheriff. The Court ordered the attorney to repay the defendant the £22, but refused to compel him to pay the costs of dismissing the motion for review of taxation—not being satisfied that the defendant had instructed him not to take such proceedings. *Betts v. Chapman*, 2 All. 450.

**2—Ordering Attorney to pay costs of dismissing motion for review.**

Where on an application for a review of taxation of costs, it appeared that the bill was exorbitant, and the items disallowed by the clerk, with trifling exceptions, illegally charged, the attorney applying for the review was ordered to pay the costs of dismissing the motion. *Doe v. Dobson*, 2 All. 591.

**3—Allowance of Counsel Fees—Clerk's duty.**

In taxing costs between attorney and client, counsel fees may be allowed without the Judge's fiat; but it is the duty of the Clerk to decide on the authority to make the the payment, and the reasonableness of the charge. *Ex parte James*, 3 All. 286.

**4—Outlays—Special Jury—Retaining Counsel.**

An attorney is entitled to recover from his client a sum paid for a special jury, where the cause has been so tried with the client's knowledge, but the Judge has refused to certify. *Ex parte James*, 3 All. 286.

An attorney has no general authority to retain counsel in a cause at his client's expense, though such authority may be implied. If the attorney has an opportunity of conferring with his client, his consent should be obtained. *Ibid.*

**5—Costs in Inferior Court—Clerk taxing.**

In an action on an attorney's bill of costs incurred in the inferior Court, the reasonableness of the charges may be enquired into. The Clerk of the Supreme Court may tax a bill of costs in the inferior Court as between attorney and client. *James v. McLean*, 3 All. 164.

**6—Taxable Charges—Services performed at request of Client.**

In taxing costs between attorney and client, the attorney is entitled to the taxable charges of drawing and copying a declaration in a suit brought by the client, though he is not the attorney in that suit; the service having been performed at the request of the client, and with the assent of the attorney in the suit. *In re Bayard*, 1 All. 571.

7—*Quære*, Whether an attorney can recover from his client money paid for counsel fees? See *Jack v. Clews*, 3 Kerr 637.

**8—Recovery for services other than provided for in the ordinance.**

In an action by an attorney to recover the amount of a

bill of costs incurred in defending defendant against a criminal charge, the bill had been taxed by the clerk, who taxed only such items as the ordinance of fees provided for, and refused to recognize or touch the other items. *Held*, That the jury were bound by the clerk's taxation as to the taxable items, and as to the others they might find for the plaintiff for such services as were in the nature of the attorney's work, but that plaintiff could not recover for counsel fees.

*Quære*, Whether if the clerk had followed the English practice and taxed the whole bill it would have been sustained? *Heck v. Tingley*, 1 *Han.* 418.

**9—Rule dropped—Fee of Counsel upon argument.**

Where a rule for a new trial dropped by reason of the Court being equally divided, it was held by Fisher, Wetmore and Duff, J. J., (*Weldon, J. diss.*) that the plaintiff was entitled to a counsel fee on the argument of the rule. *N. B. Railway Co., v. Murray*, 2 *P. & B.* 412.

X.

MISCELLANEOUS.

**1—Action for negligence—Preferring of judgment.**

In an action against an attorney for negligence in conducting a suit for the plaintiff against M., it was proved that at the time the plaintiff employed the defendant, he was informed the defendant had a judgment against M., which would have priority over the plaintiff's claim. *Held*, 1. That it was no breach of duty on the part of the defendant to proceed on his own judgment against M., and exhaust his property before issuing execution on the plaintiff's judgment. 2. That evidence could not be given that the amount for which the defendant's judgment was signed against M., was not really due. *Alison v. Weldon*, 4 *All.* 681.

**2—Record—Name of Attorney.**

The Court consider it irregular for the name of more than one attorney of firm to appear as attorney on record. *Gilmour v. Bull*, 1 *Kerr* 94.

**3—Partnership—Notice by one of Firm.**

Where two attorneys in partnership appear in a suit, a subsequent notice of a proceeding in the suit signed in the name of one of them is sufficient; the act of one partner in such a matter being the act of both. *Doe v. Taylor*, 3 *All.* 487.

**4—Pleading—Action against.**

Where Bill filed in vacation, attorney must plead within twenty days from time of service of copy, and cannot wait till ensuing term. *Sayre v. Gilbert*, 2 *Kerr* 225.

**5—Misconduct—cognizance of, by Court.**

Where a motion was made by the defendant against the plaintiff's attorney, requiring him to refund costs which had been taxed for the plaintiff, on the ground that a payment had been made on the demand before action brought, reducing it within a Magistrate's jurisdiction, and that the attorney aware of it had incurred a large amount of costs, which the defendant had paid; and the application was accompanied by a draft of the bill of costs, which was said by the attorney to be lost or mislaid, in which draft there were apparent overcharges; the ground of application in regard to the payment was satisfactorily answered, but the Court considering that the attorney had not exercised sufficient forbearance towards the defendant, in going on with the suit when there was a very small sum due, ordered him to prepare a new bill to be taxed, to refund to the defendant the overplus, and pay the costs of the motion, although the attorney had offered before the application to refund a certain amount, or to abide the taxation of the opposite attorney. *Melanson v. White*, 3 *Kerr* 501.

**6—Misconduct.**

If an attorney of this Court is guilty of any misconduct in practising in an Inferior Court, this Court will take cognizance of it on a summary application. *Gilbert v. Soney*, 3 *Kerr* 679.

7———The Court will investigate a complaint made against an attorney by his client, and make such order therein as justice requires. On such an investigation an attorney was ordered to refund money to his client and pay the costs of the application. *In re Lugrim, Trin. T. 1831.*

**Proceeding in action after receipt given.**

*See Receipt, Moran v. Gallagher.*

**Ordering Attorney to file writ.**

*See Execution IV. 7.*

**8—Change of Attorneys—Attorney in contempt—Time of application.**

Where a Judge's order had been made to change the attorney and file the papers in a cause, in ignorance of the original attorney being in contempt, a party wishing to take advantage thereof, should apply to rescind the Judge's order. *Kerlin v. Baillie, 2 All. 115.*

It is too late to apply after receiving a copy of declaration. *Ibid.*

**9—Proper person to make application—Reasons.**

An order for a change of attorney ought not to be made on the mere application of the attorney, on the ground that he is unable to proceed in the suit in consequence of non-payment of court fees. *Kelly v. Dow, 4 All. 256.*

Where such an order had been made and acted upon, and it did not appear that the client was aware of the disability of the attorney at the time he commenced the suit, the Court refused to set it aside. *Ibid.*

**10—Taking Warrant of Attorney—Items improperly included—Ignorance of party.**

It is improper for an attorney to include in an account against his client, claims for money lent, with professional charges, in order to take security for the whole; nor should he take a warrant of attorney from his client without affording him an opportunity of taking legal advice upon the nature of the demand and the security. *Smith v. Jones, 2 All. 176.*

Where an attorney, without any fraudulent intention, took from his client a warrant of attorney for costs of suits and money lent, etc., and for a settled account due from a former deceased client, whom the defendant represented, the Court refused to set aside the security and a judgment signed thereon, after two executions had been issued and money levied thereunder without objection by the defendant. But sums overcharged were deducted from the judgment, though it had been assigned to a third person. Such assignments should not be made by attorneys, particularly when there is any question about the amount. *Ibid.*

*Semble*, That if the warrant of attorney had been taken for costs alone, the judgment would have been set aside. *Ibid.*

**11**———If any attorney, knowing that he is dealing with ignorant persons, takes from them on a settlement, a warrant of attorney for debt and costs, in which there are extravagant charges, such settlement may be opened up and examined within a reasonable time. *Gilbert v. Soney*, 8 Kerr 679.

**12—Action on Attorney's Bill—Settlement of suit—Material question for jury—Defence.**

Where the defence to an action on an attorney's bill is that the costs were incurred in a suit which the attorney had settled without the defendant's authority, it is a material question for the jury, in determining whether the defendant obtained any benefit from the plaintiff's services, to ascertain whether the previous suit was settled with his consent. *Dibbles v. Wood*, 1 Pug. 187.

**13—Counsel—Witness.**

Where a counsel in a cause is by consent allowed to go upon the stand to prove a particular fact, he becomes a witness in the cause generally, and may be cross-examined upon any fact in the cause. *Gilbert v. Campbell*, 2 Han. 55.

**Examination as Witness—Objectable.**

*See New Trial.*

**14—Addressing Jury—Objectionable observations.**

If a counsel in addressing the jury makes remarks which are considered objectionable by the opposing counsel, he should call the attention of the Judge to it at the time; if he does so, the Judge concurring will require the objectionable observations to be withdrawn. *Gilbert v. Campbell*, 2 *Han.* 55.

**15—Admissions.**

Where in an action of covenant brought by the assignee in fee on a warranty of title, the declaration alleged, as part of the damages, that by reason of the defect in the title, the plaintiff had not been enabled to obtain so large a price for the land as he otherwise might, and would have obtained; and the plaintiff's counsel stated, in his opening at the trial, that the plaintiff had before the commencement of the action sold and conveyed the land for an inadequate consideration, in consequence of such defect in the title; and afterwards put the deed in evidence. *Held*, That the defendant was entitled to the benefit of this admission and proof, as defeating the plaintiff's action, although he could not have been permitted to give evidence of such conveyance under any of the pleas upon the record. *Wallace v. Vernon*, 1 *Kerr* 5.

16—Where in an action for negligence as a surgeon, the defendant's counsel in addressing the jury relies on his client's skill as a surgeon, he cannot afterwards object on a motion for a new trial that there was no evidence that he was a surgeon. *Kelly v. Dow*, 4 *All.* 485.

**Counsel not being able to attend trial—Excuse on motion for judgment.**

*See* Judgment, as in case of Non-suit II.

**Actual signature of counsel not necessary to the copy of plea delivered.**

*See Oulton v. Palmer*, 2 *All.* 364.

**Notice to Counsel of Party.**

*Quære*, Whether notice to counsel of a meeting of arbitrators in a cause, which is referred, is notice to the party? *See Brown v. Gurriet*, 2 *All.* 124.

**No actual receipt of money by Attorney—Arrangement of debt—Action of Assumpsit will not lie for money had and received.**

*See Assumpsit, 86.*

**ATTORNEY'S LIEN.**

*See Set-off, 15, Abel v. Light.*

**ATTORNEY-GENERAL.**

**1—Privileges—Costs.**

In suits where the Queen is a party and entitled to costs, a retaining fee of 25s. is allowed to the Attorney-General; and for all papers properly termed "pleadings," a higher rate per folio is allowed for drafting and copying, than in suits between subjects. *Attorney-General v. Twenty Casks of Spirits, 3 All. 404.*

**2—Scire Facias—Fiat.**

A *scire facias* at the instance of a private prosecutor, to repeal letters patent, can only issue on the fiat of the Attorney-General, who may withhold his assent if no sufficient ground is shewn. A draft of the writ and a statement of the facts on which it is founded should be laid before the Attorney-General, and if he is disqualified from acting, the Solicitor-General, or a Crown lawyer should decide on the application. *LeGall v. Duffy, 3 All. 57.*

**3—Liability for Sheriff's Fees.**

The Attorney-General is liable in his personal capacity to a sheriff for such of the sheriff's fees of office on the execution of Crown processes, as are included in the Attorney-General's taxed bill of costs, and received by him from defendants in the several Crown suits, after demand made, where no ground is shewn for retaining them. *White v. Peters, 2 Kerr 329.*

**4—Removal of Cause.**

On an application to remove an action from an Inferior Court into this Court, on the ground that the revenues of the Crown would be affected by it, the statement of the Attorney-General to that effect is sufficient. *Price v Bayard, 5 All, 234.*



**AUTHORITY.****Of Attorney.**

*See* Attorney.

**Construction of written Authority.**

*See* Contract 9.

**AUTREFOIS ACQUIT.**

*See* Bastardy.

*See* Justice of the Peace, V. 5.

**AVERMENT.**

*See* Pleading.

**AWARD.**

*See* Arbitration.

**BAIL.**

*A* DISCHARGE.

*B* RELIEF—APPLICATION FOR.

*C* LIMIT BOND (SURETIES.)

*D* RENDER.

*A***DISCHARGE OF.****1—Plaintiff procuring absence of defendant.**

Special bail discharged, although indemnified, when prevented from surrendering defendant by plaintiff's procuring his absence from the Province. *Pollock v. Short*, Ber. 279.

**2—Surprise—Representation of Plaintiff's Attorney.**

Where the plaintiff's attorney induced the bail to suppose that execution would be issued against the property of the principal, proceedings against the bail were set aside on the ground of surprise. *Haynes v. Chalmers*, C. Ms. 1.

**3—Delay.**

Where special bail was entered in June, 1826, and declaration delivered in March, 1827, since which time no proceedings were taken by the plaintiff, the bail were discharged on account of the delay. *Ganet v. McIntosh*, C. Ms. 140.

**4—Omitting to enter cause in time.**

When upon a summary writ returnable in Hilary term, 1842, special bail was regularly put in and notice given, but the cause was not entered by the plaintiff in that or the next succeeding term; but an entry was irregularly made in Michaelmas, 1842, and final judgment signed in the April following; the court stayed proceedings subsequently taken on the recognizance of bail, and ordered an *exoneretur* to be entered on the bail piece, without costs. *Muldoon v. Beveridge*, 2 Kerr 532.

**5—Proceedings stayed by defendant.**

Where the defendant obtained a stay of proceedings until security for costs was given, after sufficient time had elapsed, and no further proceedings in the cause taken by the plaintiff, the court ordered an *exoneretur* to be entered on the bail piece. *Hill v. Rind*, Ber. 281.

**6—Not giving security for costs after stay of proceedings.**

Where the defendant in Hilary term, 1854 had obtained an order to stay proceedings until security for costs was given, and the plaintiff had not given the security, the Court discharged the bail in Michaelmas term, 1855. *Ratchford v. Morris*, 3 All. 245.

**7—No ca. sa. against principle.**

When no *ca. sa.* against the principal is found on file in the clerk's office, proceedings against the bail will be set aside. *Merritt v. Lindsay*, Hil. T. 1828.

**8—Affidavit not filed in time—Entry docket.**

It is no ground for setting aside proceedings against bail, that the writ and affidavit to hold to bail have not been

filed within the time prescribed by rule of Court, provided the entry docket has been duly filed. *Gilmour v. Simpson*, Mich. T. 1861.

**9—Variance—Affidavit—Declaration.**

The cause of action stated in an affidavit to hold to bail, was the non-delivery of goods by the defendant as master of a vessel, according to a bill of lading. The contract set out in the declaration upon the bill of lading contained an exception of "the damages of the seas and breakage." *Held*, That there was a material variance between the declaration and affidavit, and that the bail were discharged. *Holderness v. McFarlane*, 3 All. 152.

**Bankrupt—Right to have bail bond cancelled**

See Bankrupt 5.

**10—Affidavit to hold to bail—Filing—Time—Waiver.**

It is in general sufficient that affidavits to hold to bail be filed within thirty days after the term in which the writ is returnable, and as the defendant cannot object to the want of the affidavit being on file until he has entered special bail, such entry is not a waiver of the omission to file the affidavit. But pleading to the action after a term has intervened is a waiver, as the defendant might have searched the office and informed himself of the irregularity. If a defendant, being aware that the plaintiff has not filed his entry docket or declaration in the cause, appears at the trial and defends the action, he thereby waives the previous irregularity in the plaintiff's proceedings. *Read v. McLellan*, 1 All. 3.

**11—Filing affidavit.**

The affidavit to hold to bail should be filed within the time limited for entering the cause, and unless it is found on file at the expiration of that period, the defendant is entitled to be discharged on filing common bail, unless the neglect to file it is most satisfactorily accounted for. *Palmer v. Densmore*, 2 Pug. 150.

**12—No Statement of indemnity.**

On application to set aside proceedings for irregularity it is not necessary to state that the bail are not indemnified. *Ib.*

**13—Declaration—Wrong entitling of.**

An amendment of the declaration by entitling it specially if the last day of the term generally, where there is no variance in the cause of action, does not discharge the bail, the entitling of the declaration being only a fiction. *Cotter v. Brownell*, 1 *Pug.* 856.

**14—Application—Lateness in applying for exoneretur.**

It is not too late after being sued on their recognizance, for bail to apply to enter an *exoneretur* on the ground of a defect in the affidavit of debt. *Lyons v. Ellison*, 5 *All.* 367.

**Action by bail—Declaration disclosing no cause of Action—Return of constable.**

See Pleading I. 70. *Towers v. Stephenson*.

**15—Writ—Affidavit—Irregularities in.**

The affidavit to hold to bail was objected to on the grounds, 1st. That it was not entitled in the court though sworn before a commissioner. 2nd. It stated defendant's indebtedness, both for goods sold and delivered, and in same amount for account stated, without stating positively it was the same debt. 3rd. That deponent was illiterate and there was no certificate of the affidavit having been read over. *Held*, That even if any irregularity in the affidavit or writ would be a ground for relieving bail (which was not admitted,) the objections taken to this affidavit were not sufficient. *Cotter v. Brownell*, 1 *Pug.* 856.

**16—Principal having means to pay debt—Leaving limits—Knowledge of bail.**

The fact of the principal having means to pay the debt, and that the bail knew he had gone off the limits and did not communicate the fact to the plaintiff or his attorney, is

no ground for opposing an application by the bail for relief—there is no duty on bail to do this. *Merrit, Assignee, &c., v. Clancy et al* 2 *Pug.* 476.

**17—Delay—Not giving particulars—Indemnity—Bail not required to negative.**

Where particulars of plaintiff's claim were demanded on October 13, 1874, and were not delivered until the 18th January, 1875, and no excuse was given for the delay, except forgetfulness of the attorney, the court held the bail were entitled to be discharged.

It is not necessary for bail, in an application for relief on the ground of plaintiff's delay, to negative being indemnified. *Gray v. Vesey*, 3 *Pug.* 349.

**B**

**RELIEF—APPLICATION FOR.**

**18—Action on Recognizance—Render—Notice.**

Where an action was brought on a recognizance of bail after render of the principal, but before notice thereof to the plaintiff, the Court refused to stay the proceedings except on payment of costs. *Duff v. Hunter*, 1 *Kerr* 499.

**19—Reference—Pleading.**

Bail cannot plead to an action on the recognizance, a reference of the original suit to arbitration. They should apply to the Court to have an *exoneretur* entered on the bail piece. *Sharp v. Connell*, 3 *Kerr* 125.

**20—Special contract—Common affidavit—Verdict.**

Where a party is held to bail on the common affidavit for goods sold, and the declaration is framed with counts to recover a demand arising out of a special contract, together with a common count for goods sold; and on the trial a general verdict is given for the plaintiff on evidence however which only referred to the special contract. *Held*, That the bail were entitled to have an *exoneretur* entered on the bail piece, on motion, without first applying to have the verdict limited to the special counts, and that the affidavit did not include the demand arising out of the special contract and sounding in damages. *Ford v. Ladd*, 3 *Kerr* 287.

**21—Cause not tried—Agreement to give Confession.**

Proceedings against bail were set aside on payment of costs, where notice of trial had been given for the sittings after Trinity term, 1858, but the cause was not tried in consequence of the defendants' agreement to give a confession, and the confession, though dated 1st June, 1858, was not given till October, 1859, when judgment was signed. *Raymond v. McMackin*, 4 All. 524.

**22—Mistake of Plaintiff—Delay in amending.**

Where the defendant's attorney in entering special bail mistook the plaintiff's name, and was informed of the error by the plaintiff's attorney, but died soon after without having amended it, and the defendant employed another attorney, who made no application to amend the proceedings until it was too late to try the cause in the county where the venue was laid; the Court refused to set aside the proceedings on the bail bond and let the defendant in to defend, though the plaintiff's name was mis-stated in the entry docket; the defendant not having been misled thereby. *Riorden v. Dunn*, 3 All. 124.

**23—Delay—Excuse.**

Where an action was brought in August, 1858, and notice of trial given for the January circuit following, which was countermanded, and no further step taken by the plaintiff: the Court refused in Trinity term, 1855, to relieve the bail on the ground of delay; the plaintiff's attorney stating that the delay had been caused by the difficulty of obtaining evidence in a foreign country, and that he intended to proceed to trial at the next Circuit. *Jarvis v. Hardy*, 3 All. 242.

**24—Condition to pay costs not fulfilled.**

In an action brought on a limit bond against the principal and sureties for an escape, it appeared that the plaintiff let the defendant go, upon the understanding that the defendant should pay all the costs, the Court refused relief to the sureties under 6 Wm. IV., cap. 41, sec. 18, it not appearing that all costs had been paid. *Robertson, assignee of Sheriff v. Currie et al*, Ber. 190.

**25—Attachment for costs in Equity Limit Bond given by prisoner—Application for relief.**

When an action is brought in the Supreme Court on a limit bond given by a prisoner in custody on an attachment for costs in Equity, application for relief by the sureties must be made to the Supreme Court. *Bartlett v. Glasgow, Hil. T. 1871.*

**26—Sureties on limit bond—Order for render Judge County Court.**

Under the Act 12 Vic. cap. 39, sec. 14, the sureties in a limit bond may obtain an order for the render of the principal; and by 31 Vic. cap. 13, sec. 10, a judge of the County Court may make the order. The term "bail" in those Acts includes the sureties in a limit bond. *Ibid.*

**27—Pending pleading.**

Bail cannot after pleading that no *ca. sa.* duly issued against the principal, and while that plea stands, apply to the Court to set aside that proceedings for irregularity, on the ground that the execution did not remain in the sheriff's office four days. *Fulton v. Andrews, 2 All. 359.*

After failure of such an application, a motion to withdraw the plea and set aside the execution for the same irregularity, was refused. *Ibid.*

**28—Application on ground of delay in plaintiff.**

In an application to discharge the bail in a suit on the ground of delay in the plaintiff's proceedings, it must be sworn that the application is made on behalf of the bail. *Ritchie v. Porter, 2 All. 360.*

**29—Objection to sufficiency of affidavit.**

*Quære*, Whether it is too late for bail to object to sufficiency of an affidavit, after the time for putting in bail has expired, if they did not see it before that time. *Simonds v. Simonds, 2 All. 468.*

**30—Irregularity in affidavit to hold to bail—Waiver.**

An irregularity in affidavit to hold to bail is waived by pleading to the action. *See McPhelim v. Larson, 4 All. 71. See Supra A. Read v. McLellan.*

**Waiver.**

Bailable capias stating no cause of action. *See Practise IV. 1.*

**31—Render to gaol—Whence escape.**

If a debtor escapes from the limits, and his bail apply to be relieved on rendering him to gaol under the Act 13 Vic. cap. 31, such relief will only be granted on condition of his being rendered to the gaol whence he escaped. *Peters v. Perley*, 2 *All.* 585.

**32 — Bail bond—Action — Insolvency of principal — Affidavit.**

An application by bail under the 1 Revised Stat. cap. 124, to stay proceedings in an action on a limit bond, on account of the insolvency of the principal, was refused; it appearing that the principal had property sufficient to pay the debt. *Bradford v. Fenton*, 3 *All.* 407.

The affidavit to support such an application should state that it is made at the expense of the bail and without collusion with the principal. *Ibid.*

*Quere*, Whether, after application for relief, the bail can defend on the merit? *See Rippey v. Austin*, 4 *All.* 77.

**33 — Recognizance — Pleading to — Cause referred, should apply for an exoneretur.**

*See Practise V. 22.*

**34—Bail for principal debtor—Application by other bail for relief—Same subject matter of suit — Both bail fixed—Payment of debt by one.**

A., the maker, and B. the accommodation endorser of a note, were held to bail, and the bail in both cases fixed. B's bail settled the judgment on the understanding with the plaintiff's attorney that he should continue the proceedings against A's bail for their (B's bail) benefit. On application by A's bail for relief on the ground that the debt had been paid—*Held*, That they, being bail for the principal debtor, were not entitled to relief at the expense of B's bail, especially as it did not appear that they were not indemnified. *McFearon v. Callaghan*, 5 *All.* 588.



**35—Escape—No damages—No return of principal.**

Matters which merely tend to shew that the plaintiff has sustained no damage by the escape of a debtor from the limits, do not afford a ground for summary relief to his sureties under the Act 10 and 11 Geo. IV., cap. 80. The principal should have returned within the limits, or be prevented from doing so by inevitable accident before such an application will be granted. *Bonnell v. Ackerman, Mich. T. 1834.*

**36—Equitable grounds for relief—Bail put in by one person for purposes of render.**

At the time of entering special bail, the defendant was receiving a weekly allowance under the Insolvent Confined Debtors' Act, which the plaintiff then discontinued to pay, and defendant was discharged from custody in consequence of the non-payment, by an *ex parte* order. The bail afterwards obtained a Judge's order, and rendered the defendant to custody, and he, (without any notice to the plaintiff) obtained an order discharging him from custody. The plaintiff having obtained judgment against the defendant, and issued a *ca. sa.* to fix the bail, proceeded against them on the recognizance. The Court refused to stay proceedings against the bail, it not appearing that they had any equitable ground for relief.

Bail may be put in by one person only, for the purpose of rendering the principal. *Duncan v. Barnes, 6 All. 172.*

**37—Order of Judge allowing principal to be absent from the Province—Absence before order made—Application for relief.**

B. and F. became bail to the action for S. at the suit of A. At the time of signing judgment against S. he was absent from the Province and remained away for some time. During his absence an order was made allowing him to be absent until a time therein limited. B. and F. being sued for the breach of the recognizance prior to the making of the order, applied for relief under the Consolidated Statutes, chapter 87, sec. 81, and chapter 88, sec. 5. B. being sick at the time of the application, did not make

any affidavit. From the affidavits of F. and S., who had returned to the Province, it appeared that neither B. nor S. was indemnified. A. in his affidavit in answer, charged B. and F. with being confederate with S. in preventing him (A) from obtaining the fruits of his judgment, and in maintaining the nuisance, to recover damages for which the original action was brought, and alleged that S. had parted with his property shortly before judgment against him. These charges were not answered, and nothing was said as to, at whose expense the application was made. S. had never been rendered in discharge of his bail. *Held*, by Weldon and Fisher, J. J., that the Court had power to grant the relief asked for, and that the application of B. and F. ought to be granted upon their paying A. his costs up to that time and upon rendering the defendant into custody.

*Held*, by Wetmore and Duff, J. J., without expressing any opinion as to whether, under the statute, the Court could grant the relief asked for, that the defendants had not made out a case entitling them to the exercise of the equitable jurisdiction of the Court, and that their application should be refused.

*Semble*,—An order of a Judge allowing a defendant who has put in special bail, to be absent from the Province, has no retro-active effect. *Byron v. Batson and Flagg*, 2 P. & B. 396.

**38—Interest on judgment against principal not allowed against bail.**

Bail are only liable for the sum sworn to and costs, and the Court will not allow interest on the judgment against the principal in an action or other recognizance. *Byron v. Flagg*, 2 P & B. 396.

**C.**

**LIMIT BOND—SURETIES.**

**39—Relief—Conditions.**

Where an action had been commenced on a limit bond, the Court relieved the surety on his rendering the principal

and paying the costs of the action on the limit bond, together with the costs of the application, within a period fixed by the Court. *McIntosh v. Allen*, 8 Kerr 362.

**40—Insufficiency of affidavit on application—Answer.**

In application for relief by the sureties in a limit bond, under the 1 Rev. Stat. cap. 124, the affidavit neither stated, when or at whose instance they became bail; what property the principal had at the time, whether the bond was given on arrest upon mesne or final process or render; or when the principal escaped. The affidavit in answer alleged that the principal had stated that he would have paid the debt if the defendants had not become his bail; that he had put property into the hands of L. to secure the person who might become bail; that the defendants became bail at the request of L. without his knowledge, and that L. had become insolvent and transferred the property to one of the bail. *Held*, That the sureties were not entitled to relief. *Smith v. Leary*, 4 All. 162.

**41—Defendant supersedable before escape.**

The sureties on a limit bond entered into for a defendant in custody on mesne process, are entitled to be discharged, if the defendant before his escape had become supersedable. *Gordon v. French*, 2 Kerr 610.

**42—Sureties not affected.**

An agreement between the parties that no advantage should be taken of the omission to charge in execution, cannot affect the sureties, unless made with their privity. *Ibid*.

*See* Bond (Limit Bond.).

*D*

RENDER.

**43—Fictitious name.**

If two names appear on the bail piece as bail, it is sufficient for the purpose of render, though one of them is a fictitious person. *Wetmore v. Elliot*, 1 All. 720.

*Quere*, Whether, in such a case, the plaintiff might except to the bail? *Ibid*.

**44**———Bail may be entered by one person only for the purpose of rendering the principal. *Duncan v. Barnes*. 6 *All.* 172.

**45—Action on Limit Bond—Render after.**

The render of the principal after an action brought for an escape on a limit bond, is not a ground for relieving the sureties. *See* Bond 8.

**46—Notice of render—Omission—Waiver.**

*Quere*. Whether a notice of render which omits to state the lodgment of the order for render with the gaoler, is sufficient? Such an objection to a notice is waived by the plaintiff opposing the defendant's discharge out of custody under the Insolvent Confined Debtors' Act, and by discontinuing and receiving the costs of an action brought against the bail before render. *Jackson v. Black*, 4 *All.* 76.

A notice of render signed by the defendant's attorney is sufficient even after judgment, if he continue to act as attorney. *Ibid*.

**47—When may be made.**

Bail to the Sheriff may render the defendant before the expiration of the time for putting in special bail. *James v. White*, 6 *All.* 431.

**48—Exception—Entry.**

Exception to bail not necessary to be entered in Judge's book. *See* *Porter v. Burns*, 1 *All.* 106.

**49—Escape—Order for render after.**

An order to render may be made after an escape from the limits, and proceedings on the bond against the sureties for the escape will be stayed on payment of costs. *McMillan v. Largen*, 6 *All.* 313.

**BAIL (COMMON.)**

*See* Practice.

**BAIL BOND.**

*See* Bond B.

**BAILEE.****1—Pawnee may maintain replevin for pawned goods wrongfully taken.**

A pawnee may maintain replevin against the pawnor for a wrongful taking of the goods pledged. Proof of such pawning is sufficient to enable the pawnee to recover in an issue joined upon the ordinary plea of property against the general owner. *Gibson v. Boyd*, 1 *Kerr* 150.

**2—Conveyance to Trustees—Retaining part of goods.**

Defendant conveyed all his property to trustees for the benefit of his creditors—certain goods of which the trustees had no knowledge, remained in his possession. *Held*, That the general property in the goods passed to the trustees, and that defendant could not be considered as holding the goods as their bailee. *McIntosh v. Hastings*, 6 *All.* 234.

**Misfeasance—Want of privity—Loss of scow.**

The defendant was master of the "Francis Herbert," which had been chartered by C. McK. & Co., to carry a load of deals from St. John to Dublin. C. McK. & Co. purchased the deals from J. & B. and employed them to deliver the same alongside the vessel. C. McK. & Co. paid J. & B. for the scowage and then charged the vessel with the amount so paid for scowage. J. & B. borrowed a scow from the plaintiffs which they left loaded with deals alongside the "Francis Herbert," and fastened to her as directed by the mate. The next morning the scow was missing. The plaintiffs did not offer any evidence to shew how the scow was lost, and there was no evidence of misfeasance on the part of the defendant. *Held*, That the relation of bailor and bailee did not exist as between the plaintiff and defendant, and in the absence of any evidence of misfeasance on the part of the defendant, he was not liable to the plaintiffs for the loss of the scow. *Wetmore et al v. McKenzie*, 1 *P. & B.* 557.

**BAILIFF.****Special—Appointment at Request—Liability of Sheriff.**

*See Sheriff* 21.

**Special bailiff of plaintiff allowing defendant to go at large, cannot retake on a new ca. sa.**

*See Execution II. 5.*

### BAILMENT.

#### 1—Action by Bailor for negligence to horse.

The Court refused to set aside a verdict given for the plaintiff in an action by the bailor against the bailee of a horse for negligence, although the jury were not able to agree whether the bailment was a *commodatum* or *mutuum*, the injury being such as to make the defendant liable in either case. *Rainsbury v. Ross*, 2 Kerr 179.

#### 2—Hiring horse—Death—Liability.

A person hiring a horse to perform a journey, is not liable for the value of the horse, if he dies on the road without the fault of the hirer. *Quare*, Whether, in such case, the owner of the horse is entitled to recover the hire on the *quantum meruit*, for the time the defendant used the horse? *Dickie v. Campbell*, C. Ms. 44.

#### 3—Goods deposited in Warehouse—Special instructions.

Plaintiff deposited goods in defendant's warehouse (which was also a bonding warehouse,) with directions not to deliver them except to his order. F., for whom the goods were intended, but to whom the defendant was directed not to deliver them without payment, paid the duty at the custom house, and obtained a permit to release the goods from the public warehouse, and then got possession of them from the defendant's clerk. *Held*, That the defendant was liable to the plaintiff for the goods. *Gunnison v. Thomas*, East. T. 1861.

### BANK.

#### 1—Authority to accept bills—Declarations directory.

An incorporated Banking Company has authority to accept bills of exchange as a necessary incident to the transaction of its business, and such acceptance need not be under the Corporate Seal. A bill of exchange was

drawn upon a bank payable in three equal instalments. When the first instalment became due the holder presented it at the bank ; the cashier paid the first instalment and returned the bill to the holder with the following endorsement :—" Paid on the within \$741.66., 12 August, 1861." *Held*, An acceptance for the remaining instalments. The 20th section of the Act 4 Wm. IV. cap. 44, incorporating the Central Bank, which declares that every bond, bank bill or other instrument by which the Corporation may be held liable for the payment of money, shall declare in such form as the directors shall prescribe, that payment should be made out of the joint funds of the Corporation is directory only, and its non-observance does not render such instrument void.

*Quere*,—Whether this section applies to any instruments except those issued by the bank? *Berton v. Central Bank*, 5 *All.* 493.

## **2—Charter of Incorporation—Directions as to payment—Omission.**

By the Act incorporating the Central Bank, 4 Wm. IV. cap. 44, sec. 20, every bond, bank bill, or other instrument by which the bank may be liable for the payment of money, shall declare in such form as the directors shall prescribe, that payment shall be made out of the joint funds of the corporation. *Quere*, Whether the omission of such declaration would render a contract void? But, *Held*, That after a part performance of the contract, and receiving property under it, the bank could not set up this objection in answer to a suit for specific performance of it. *Pickard v. Central Bank*, 5 *All.* 472. See Equity—same case.

## **3—Savings bank—Directors—Tenure of office—Liability.**

The Act 6 Geo. IV., cap. 4, relating to Savings Banks, declared that all moneys, etc., belonging to the institution were vested in the trustees for the time being, for the use and benefit of the institution, and of the respective depositors therein. By regulations made under the authority of

the Act, the management of the Savings Bank was vested in a president and eight directors who were to be chosen annually. *Held*, That the president and directors so chosen were the trustees under the Act, and that they continued in office after the expiration of the year, none others having been chosen in their places—and were liable to the plaintiff for money deposited in the bank. *Gilchrist v. Wyer*, *Ber.* 249.

**Banker unlicensed—Unstamped check.**

*See* Check 1.

**Liabilities of stockholders.**

*See* Joint Stock Company 9.

**BANK CASHIER.**

**Acceptance of check.**

*See* Check.

**Power to bind stockholders.**

*See* Fraudulent Misrepresentation.

**BANK NOTE.**

**Bank note payable to bearer.**

Holder may maintain action on, though he has no beneficial interest in the note, and holds it merely as the agent of the owner for the purpose of demanding payment. *See Allison v. The Central Bank*, 4 *All.* 270.

**Forgery of—What amounts to.**

*See* Criminal Law II. 20.

**BANK STOCK.**

**Executors allowing stock to remain undisposed of—  
Liability as contributories.**

*See* Winding Up Act 5.

**Bankers' lien.**

*See* Lien.

**BANKRUPT.**

**Privilege from arrest.**

*See* Arrest.



**Impeaching certificate for fraud—Cannot be shewn on trial.**

*See Evidence III., 18.*

**Judgment of non-suit, although plaintiff a bankrupt.**

*See Judgment as in case of non-suit II. 11.*

**Plaintiff executing writ—No knowledge of bankruptcy—Trespass.**

*See Sheriff 8.*

**Rent Accruing due after issue of fiat.**

*See Harding v. Baker, 1 All. 576.*

**Interest in case vesting in assignee.**

*Ibid.*

**Provisional assignee—Right to sue.**

*See Beardsley v. Stephenson, 1 All. 681.*

**1—Claim provable under fiat—Liquidated damages.**

The defendant conveyed land to A., with a covenant for title, which was broken by the existence of a prior mortgage, which A. was obliged to pay. *Held*, That the amount so paid was liquidated damages, and was a claim provable under a fiat in bankruptcy afterwards granted against the defendant, and was discharged by his certificate under the Bankrupt Act, 5 Vic. cap. 48. *Cunningham v. Scoullar, 4 All. 385.*

**2—Fiat—Proof.**

A fiat in bankruptcy under the Acts of Assembly 5 Vic. cap. 48, and 6 Vic. cap. 4, may be proved by a certified copy thereof without production of the Royal Gazette, except where title is to be shewn in the assignee. *Ibid.*

**3—Privilege from arrest—Pleading certificate.**

A certificate under the present English Bankrupt Acts, is a discharge of debt incurred in this Province, and may be pleaded in the Provincial courts, but *Seem*, The certificate cannot be pleaded generally, as in England, but the proceedings on which it is founded must be set out. (*See L. R., 6 C. P. 228, Ellis v. McHenry.*) *Jouett v. Lockwood, 2 Kerr 674.*

4—Where defendant was arrested for a debt due on a bond, and it appeared that after the debt was contracted he had become a bankrupt, and received his discharge under the "Bankruptcy (Scotland) Act of 1856," the Court ordered his discharge on his entering a common appearance. *Gilbert v. McLean*, 2 Han. 218.

**5—Bail bond given—Right to have cancelled.**

A person, resident in this Province, who has been declared a bankrupt in England, under the English Bankruptcy Acts, and who has afterwards been arrested here for a debt incurred in this Province, is not entitled to have the bail bond which he has entered into upon such arrest, given up and cancelled upon affidavit that he was on his way to England to surrender himself to the commissioners at a day appointed by them when the arrest took place.

*Quære*, As to the liability of the defendant to arrest, and the mode of discharge? The Court is unwilling to decide questions of such importance upon a summary application, particularly where the defendant is not in confinement. *Mayor, &c., St. John v. Lockwood*, 2 Kerr 9.

**6—Discharge from Custody.**

A defendant who was in custody on execution, at the suit of the plaintiff, at the time of the Bankruptcy Act, 5 Vic. cap. 48, coming into operation, and who has since been declared a bankrupt under the Act, and duly surrendered, is entitled to his discharge from custody, under the 24th section. *Reynolds v. Hanford*, 2 Kerr 114.

**BARON AND FEMME.**

*See* Husband and Wife.

**BARRISTER.**

*See* Attorney.

**BARRISTER'S DEED.**

*See* Deed 81.

**BARRISTER'S REPORT.**

**Commissioners not having divided land—Making report without waiting for—Objection—No exceptions filed.**

Where the Court directed commissioners to divide certain lands, and referred the matter to a barrister to take an account of the rents and profits of the lands, it was held that the barrister might make his report without waiting for the commissioners to divide the land, and that a change in the commissioners could not in any way effect the questions referred to him.

Where the whole matter appears upon the face of the report, it may be open to object to a barrister's report being confirmed, although no exceptions have been filed to it. *Fraser v. Dewitt*, 1 *Pug.* 738.

**BASTARDY.****1—Still-born child—Order.**

An order of affiliation cannot be made under the Bastardy Acts where the child is still-born, although the parish has been put to expenses in the attendance on the mother. *Regina v. Murphy*, 1 *Kerr* 524.

**2—Jurisdiction in Sessions.**

A. being charged as the reputed father of a bastard child, of which B. was then pregnant, appeared at the January Sessions and denied the charge; B. was sworn as a witness, but it appearing to the Sessions that she did not understand the nature of an oath, the case was dismissed, and A's securities discharged. After the birth of the child, A. was again charged before a subsequent Session with being the father, and pleaded *autrefois acquit*. *Held*, (Parker J., *dubitante*, and Richard J., *dissentiente*,) that the January Sessions had power to try whether A. was the father or not, though they could not make an order of filiation till the child was born, and that having acquitted him of the charge, he could not again be tried for the same offence. *Held*, per Ritchie J., That until the birth of

the child, the Sessions had no power to hear evidence or make any adjudication; and that the order of the January Sessions discharging A was void, and could not be pleaded as an answer to the charge made against him after the birth of the child. *Ex parte Estabrooks*, 4 All. 278.

### **3—Proceedings not criminal—Witness.**

A proceeding to obtain an order of affiliation under the 1 Rev. Stat. Cap. 57, is not a criminal proceeding on which the party charged is punishable on summary conviction, and therefore he is a competent witness by the Act 19 Vic. Cap. 41. *Ex parte Cook*, 4 All. 506.

*Quere*, Whether a justice of the Peace who is a ratepayer in a parish on which a bastard child is chargeable is disqualified from acting in proceedings to obtain an order of affiliation. *Ibid*.

### **4—Quashing order in part.**

An order of affiliation may be quashed in part and confirmed as to the rest, if the defective part can be separated from the other. *The Queen v. Simpson*, 1 Han. 32.

### **5—Jurisdiction—Consent—Trial by single Justice.**

Where in a bastardy case, by consent of counsel, a single Justice tried the matter alone, and afterwards made an order of affiliation, the Court held that a court could not be constituted by consent, and ordered the proceedings to be quashed. *The Queen v. the Justices of Westmorland*, 1 Han. 468.

*Held also*, that the Court not being properly constituted there was no trial at all, and the party was required to enter into recognizances to answer the charge before the sessions. *Ibid*.

### **6—Order substantially good.**

An order of affiliation adjudging the father of the child to pay £10 12s. 9d. for the lying-in expenses of the mother, and for the support of the child up to the date of the order, is substantially good, though it does not follow the form given in 1 Rev. Stat. Cap. 57. *Ex parte Kennedy*, Hil. T. 1866.

**7—Judgment on scire facias—Costs.**

A judgment on *scire facias* on a recognizance in Bastardy proceedings, under 1 Rev. Stat. Cap. 57, is conclusive while it stands, and the defendant cannot object to the amount of costs taxed by the Sessions. If the costs are excessive, application should be made to the Sessions to reduce them. *Reg. v. Carson, Hil. T. 1866.*

**8—Mayor of Fredericton—Right to sit in Sessions.**

Under the Act 2 Vic. Cap. 8, the Mayor of Fredericton has no right to sit in the Sessions on the trial of a Bastardy case arising outside of the city. *Ex parte Carson, Trin. T. 1864.*

**Order of Affiliation—Not separating amounts of money.**

9—An order for affiliation is sufficient though it varies from the form (Z) in the Revised Statutes, cap. 57, by including in one sum the amount ordered to be paid for the lying-in expenses of the mother and for the support of the child up to the date of the order.

*Semble*, That it is too late to apply to set aside an order of affiliation after a lapse of four terms. *Regina v. Kennedy, 6 All. 335.*

**10—Lying-in expenses—No evidence of—Excess—Previous arrest in other County.**

Where an order of affiliation directed the payment of a sum of money for the lying-in expenses of the mother, and there was no evidence of the payment, a certiorari issued to bring up the order.

If it appears that the amount ordered by the sessions to be paid for the expenses of apprehending the father are larger than the law allows, the excess will be deducted. It is no objection to an order of affiliation that the putative father had been previously arrested upon the charge in another county. *Ex parte Beales, 6 All. 515.*

**ACTION ON BASTARDY BOND.**

*See* Action at Law, X. 6.

**BEQUEST.**

*See Will.*

**BETTING.**

**Statute of Maine—Whether applicable to horse racing.**

*See Statute 6. Bailey v. McDuffee.*

**At election of members for Legislature.**

*See Election Law. Herbert v. Hannington.*

**BILL IN EQUITY.**

*See Equity. See Practise in Equity.*

**BILL OF EXCEPTIONS.**

1———*Quære*, Whether the facts stated in a bill of exceptions can be contradicted? *Mills v. Vail, 4 All. 289.*

2———A bill of exceptions improperly obtained in the Court of Common Pleas, may be set aside by that Court before return made to a writ of error; and the order to set it aside may form part of the return. *Mills v. Vail, 4 All. 629.*

**BILL OF LADING,**

**Estoppel by—Evidence allowable to explain.**

*See Carrier 1.*

**Refusal to deliver goods—No bill of lading produced.**

*See Pleading II. 28.*

**Considered as an entire contract.**

*See Contract 17.*

**Charter party—Agent.**

*See Shipping Law 17. Burpee v. Carvill.*

**Bill of lading not endorsed—Goods not deliverable under.**

*See Shipping Law 11-18. Domville v. Ferguson. Ferguson v. Domville.*

**Sale by specified gauge.**

*See Contract 37, McLean v. Robinson.*

**BILL OF PARCELS.**

**Delivery of, after sale of goods—Parol evidence as to quality.**

See Evidence V. 2.

**BILL OF SALE.**

**Delivery up of unregistered vessel—Fraud.**

See Shipping Law 6.

**Registry of, before an assignment in Insolvency by the grantor. whether it relates back to its delivery!**

See Insolvent Act 11. *Pugsley v. Hegan.*

**1—Conveyance to Company unincorporated by name of subsequent incorporation.**

An incorporated Company has no power to charge its name without the authority of the Legislature. Where property was conveyed to a Company under the name by which it was afterwards incorporated, but which had no legal existence at the time, it was held that nothing passed by the conveyance. *Lloyd v. E. & N. A. Ry. Co. et al* 2 P. & B. 194.

**2—After acquired property does not pass—Remedy in Equity.**

At law, a bill of sale or conveyance cannot pass the property in goods which are not in existence, or which do not belong to the grantor at the time the deed is given; though in Equity such a contract would operate to transfer to the vendee the beneficial interest in the property as soon as it was required by the grantor, and the grantee might enforce specific performance of the contract.

The Legislature may authorize after acquired property to be transferred, but inasmuch as such a mode of conveyance would conflict with the rule of law—"that a man cannot grant or charge that which he hath not"—it would require very clear and unambiguous words in the Act to shew that such was the intention. *Lloyd v. E. & N. A. Ry. Co.,* 2 P. & B. 194.

**3—Filing of—Application of act.**

The Act 37 Vic. Cap. 14, (Consol. Stat. Cap. 75,) which required the filing of bills of sale made after the passing of the Act, did not come into force until the 1st of October, 1874, though it was passed on the 8th April preceding. *Held*, That after it came into force, its provision then applied to all bills of sale made after the 8th April. *Ritchie et al v. Sheriff*, 1 P. & B. 59.

**4—Certified copy—Evidence.**

Certified copy of bill of sale not admissible in evidence under 21 Vic. Cap. 3, sec. 7, (Consol. Stat. Cap. 46, sec. 7) without proof of the execution of the original. *Lovejoy v. McDiarmid et al*, 1 P. & B. 275.

**BILLS AND PROMISSORY NOTES.**

- I. REQUISITES—FORM—OPERATION.
- II. PARTIES—RIGHTS—LIABILITY—ACCEPTANCE.
- III. PRESENTMENT—DEMAND.
- IV. NOTICE OF DISHONOR.
- V. DEFENCE.
- VI. MISCELLANEOUS.

## I.

**REQUISITES—FORM—OPERATION.****1—Continuing Security—Time of payment not specified—Demand.**

Where no time of payment is specified in a promissory note, it is payable on demand; and where such note is on interest, it does not become over-due by mere lapse of time without demand of payment having been actually made. *Thorne v. Scovil*, 2 Kerr 557.

**2—Blank Payee.**

A promissory note payable to ——— or order, cannot be recovered by the person to whom it was given, either as payee or bearer, without inserting his name in the blank as payee. *Mutual Safety Insurance Company v. Porter*, 2 All. 280.



Any *bona fide* holder of such a note may insert his name in the blank as payee. *Ibid.*

**3—Date contemporaneous with debt—Presumption.**

There is no presumption that the date of a promissory note is contemporaneous with the debt which forms the consideration; therefore a note given for liquor after the passing of the Act 15 Vic. Cap. 51, was held (R. Parker, J., *dissentiente*,) not to be void without proof that the sale took place after the passing of the Act. *McCann v. Reilly*, 3 All. 154.

**4—Current Rate of Exchange.**

A writing whereby the defendant promised to pay to his own order £42 8s. 9d, with current rate of exchange on Boston, is not a promissory note, either under the statute 3 and 4 Anne, Cap. 9, or the 1 Rev. Stat. Cap. 116. *Nash v. Gibbon*, 4 All. 479.

*Semble*, That even if a declaration on such a note could be sustained, it should have averred what the rate of exchange was, and what Boston was intended. *Ibid.*

**5—Payable to maker's order.**

A note payable to the maker's own order is not a promissory note within the statute of Anne, or the 1 Rev. Stat. Cap. 116; but when such a note is endorsed in blank by the maker, it becomes a note payable to bearer. *Ennis v. Hastings*, 4 All. 482.

It is no ground for motion in arrest of judgment that such an instrument has been declared on as a promissory note, and as having been endorsed to the plaintiff. *Ibid.*

**6—Sum certain—Lex Mercatoria.**

A bill of exchange must be drawn for payment of a sum certain; therefore an instrument drawn by A. upon B., requesting him to pay to the order of A., five months after date, \$400, with current rate of exchange on New York, is not a bill of exchange. *Cazet v. Kirk*, 4 All. 543.

A custom between merchants in this Province and the United States, to draw bills of exchange in this form, is not part of the *lex mercatoria*. *Cazet v. Kirk*, 4 All. 543.

**7—Note payable to A. or his heirs.**

Right to recover vested in personal representatives.

*Semble*, Whether the instrument is a promissory note.  
*See Doak Administrator, &c., v. Robinson*, 1 *Han.* 279.

**8—Principal and surety—Liability as makers—Property as security misapplied by surety.**

One of the defendants in a joint and several note, signed it as a surety for the other; the principal afterwards put property in the plaintiff's hands to sell and pay the note, but he applied the proceeds to the payment of another debt due to him from the principal. *Held*, That this was no defence at law, both the makers of the note being principals. *Morrison v. Kyle, East. T.* 1872.

**9—No absolute transfer—Equities.**

A note payable on demand was endorsed to the plaintiff as security for a liability he had incurred for the payee; the maker afterwards paid the amount of the note to the payee. *Held*, That the note not having been absolutely transferred to the plaintiff, he stood in the same position as the payee, and could not recover. *Estabrooks v. McKenzie, Hil. T.* 1827.

**10—Note held by creditor taking proceedings under Insolvent Debtors Act—Right not divested.**

The right to a promissory note held by a person who takes proceedings under the Insolvent Debtors Act, (21 *Vic.* cap. 17) is not divested by the publication of the notice calling a meeting of creditors, and he may afterwards transfer the note,—neither is his right divested by a composition with his creditors under the Act. *Campbell v. Gilbert*, 5 *All* 420.

**11—Stamps.**

Where no stamps are affixed to a promissory note at the time it is given, and no authority given to affix them, and only stamps of a single duty were upon it when produced at the trial, the note is void under the Statute of Canada. 81 *Vic.* cap. 9. *Travis v. Glazier*, 2 *Han.* 215.

**12—Cash or goods—Note Payable in.**

A note payable in cash or goods comes within the meaning of the Act 4 Vic. cap. 4. *Burnham v. Watts*, 2 Kerr 377.

**13—Specific articles—Note for sum payable in.**

A note for the payment of a certain sum in specific articles, becomes a money debt after the time for delivering the articles has elapsed; and a set-off is admissible in an action upon it, under the Act 4 Vic. cap. 4. *Steeves v. Hopper*, 1 All. 394.

*Quære*, Whether the plaintiff could declare for special damages for not delivering the articles? If he could, the consideration on which the contract was made should be stated. *Ibid*.

**14—Half Cash—Half Goods.**

A writing addressed to the defendant requesting him to pay the plaintiff £25, "half cash and half goods," is not a bill of exchange, nor can the plaintiff (after acceptance and payment of £12 10s. in cash) recover the balance as on an account stated. *Melville v. Bedell*, Hil. T. 1832.

**15—Foreign Currency.**

A note made in this province for a certain number of dollars "payable in U. States currency" is a promissory note. *Fisher J. dubitante.*) *Saint Stephen Branch Railway Co. v. Black*, 2 Han. 189.

**16—Donatio—Mortis Causa.**

A man in expectation of death endorsed a negotiable note specially to his wife and delivered it to her. *Held*, That the wife acquired no right by the endorsement and that it could not operate as a *donatio mortis causa*, the note not being transferable by delivery only. *See Weldon v. Weldon*, 2 All. 590.

**17—Note on demand.**

*Semble*—A note payable on demand is, after demand of payment and refusal, to be treated as over-due; and a note whereof payment has actually been made when demanded, cannot stand on a better footing. *See Dougan v. Small*, 2 Kerr 89.

**18—Memorandum at foot of note.**

A memorandum put by an endorser at the foot of a promissory note without the maker's authority, declaring it to be payable at a particular place, does not affect the maker's liability, it forming no part of his contract. *Cunard v. Tozer*, 2 Kerr 365.

**19—Affixing Stamps.**

Defendant was applied to by W. while travelling on the cars between St. John and Fredericton to insure his life in a Company, of which W. was acting as sub-agent. Defendant signed an application and gave to W. his note for the premium, drawn in favor of the general agent of the Company, but, having no stamps at the time, he authorized W. to affix them, which, the latter stated in evidence, in an action brought on the note, he did immediately after, either in St. John or Fredericton. On an appeal from the decision of the County Court, where the plaintiff recovered in an action brought on the note, the Judge's return did not disclose whether or not there was any evidence to shew that the stamp was put on the same day the note was given. *Held*, per Allen, C. J., and Fisher and Duff J. J., That they must assume that the stamp purported to have been cancelled on the same day the note bore date, and that there was, therefore, *prima facie* evidence that it was stamped on that day which would be sufficient; but, per Weldon and Wetmore, J. J., That, as the note was issued when it was given to W., the latter could not afterwards render it valid by affixing the stamp, or at all events, the plaintiff was bound to shew clearly that it had been affixed on the same day. *Wright v. Murray*, 3 Pug. 656.

**20—Knowledge of want of Stamps—Attorney affixing.**

On the trial of an action by endorsee against maker of a promissory note, it appeared on cross-examination of defendant that when the note was made, the parties had no stamps, and the maker gave the payee money to purchase the necessary stamps, and authorized him

to affix them to the note. He did not do so until some months afterwards, when a son of the payee affixed stamps of the amount that should have been affixed when the note was given. Subsequently the note was transferred to plaintiff for value. At this time it appeared to have been properly stamped, but no evidence was given to show whether or not plaintiff, who was not present at the trial, had any knowledge of the notes not having been stamped when made.

The presiding Judge allowed the attorney of the plaintiff to affix double duty stamps, and received the note in evidence. On motion for a new trial, *Held*, per Weld, n, Fisher, and Wetmore, J. J., That as the Judge was satisfied from all the evidence that neither plaintiff or his attorney had any knowledge of the want of stamps until the fact was disclosed on the trial, he was right under sec. 12 of the Act 37 Vic. cap. 47, in allowing the double duty to be paid, and that the attorney had implied authority to affix the stamps, but per Allen C. J., and Duff J., That it having been shown that the notes were not stamped when made, the onus was cast on the plaintiff of proving clearly, by his own evidence, that he first knew of the defect on the trial; and also that an attorney cannot, without special instructions from his client, restore validity to a note by affixing double duty stamps. *Leonard v. Foshay et al* 3 *Pug.* 662.

**21—Double duty—Affixing stamps—Party—Payee.**

The payee of a note is not a "subsequent" party, and cannot render it valid by affixing a double duty stamp, if the proper duty has not been paid at the time of issuing the note. Nor is an attorney who merely receives a note for collection such a holder as is contemplated by the Act. He must have a beneficial interest in the note. *Reynolds et al v. Vaughan*, 2 *Pug.* 159.

**22—Drawer—Original party.**

The drawer of a bill of exchange is as much an original party as the payee of a note, and cannot give validity to an unstamped instrument by paying double duty. *Kennedy v. Adams*, 2 *Pug.* 162.

**23—Omission to stamp through ignorance.**

*Held*, That the payee of a note for \$25, who took the same unstamped, believing that the Stamp Act only applied to notes above that amount, could make it valid by paying double duty, under section 12, of the Act. 37 Vic. cap. 47, as soon as he became aware of the fact that the note required to be stamped. *Curran v. Morgan*, 3 *Pug.* 641.

**24—Written order—Acceptance.**

B., being a creditor of A., drew upon him a written order, requesting him to pay K. "the amount of my account furnished," and delivered it to K. On presentment of the order to A., he wrote on it, "Correct, for say \$75"—signing the initials of his name. *Held*, That this instrument was not a bill of exchange, nor could K. maintain an action against A. on an account stated. *Kennedy v. Adams*, 2 *Pug.* 162.

**25—Agreement to pay plaintiff for third party.**

Plaintiff sued upon the following instrument: "12 months from the 26th June, 1873, I., (defendant,) will pay J. C., (plaintiff,) \$90 for D. P., or otherwise settle the sum of \$90 for him on a note that he says he gave J. C. for \$100." *Held*, That this was not a promissory note, payable to plaintiff, neither even an agreement with plaintiff, but with D. P. *Cochrane v. Cail*, 3 *Pug.* 224.

**26—Order upon third party.**

G. drew upon W., requesting him to pay an amount named to himself (G.) or order. *Held*, That the instrument could be declared on either as a bill of exchange or promissory note. *Golding et al v. Waterhouse*, 3 *Pug.* 313.

**27—Non-negotiable note—Endorsement on back of.**

Y. being desirous of borrowing a sum of money from plaintiff, proposed defendant as security, and said he would give plaintiff their joint note for the amount. Going to defendant's residence, the latter wrote a note in form following: "Six months after date, for value received, I

promise to pay (plaintiff) forty dollars. Y. signed at the bottom of his note, and defendant wrote his name across the back, stating at the same time that the note was "a joint note, or better than a joint note," and handed it to the plaintiff. *Held*, That the defendant was liable as maker, the circumstances clearly shewing he intended himself to be liable as such. *Piers v. Hall*, 2 P. & B. 34.

## II.

### PARTIES—RIGHTS—LIABILITY—ACCEPTANCE.

#### **1 — Holder — No beneficial interest — Note payable to bearer.**

Holder may maintain action although he has no beneficial interest in note, and holds it merely as agent. *See Allison v. Central Bank*, 4 All. 270.

#### **2—Holder.**

*Prima facie* a person who has the possession of a note endorsed in blank is the legal holder. Per Ritchie, J. *See Howard v. Godard*, 4 All. 452.

#### **3—Endorsement contrary to agreement—Payment.**

Defendant gave a negotiable note to G., who agreed to hold it as security for a liability he had incurred for the defendant; G., in violation of this agreement, endorsed and transferred the note to C., in order to raise money for G.'s benefit; C. got the note discounted at a bank, and was obliged to take it up at maturity, and two years afterwards, he transferred it to the plaintiff. G. never paid the money for the defendant, which formed the consideration for the note. *Held*, That unless C. knew the circumstances under which G. got the note, or was implicated in G.'s fraud, he would have had a right, on taking up the note from the bank, to recover the amount from the defendant; and that the plaintiff claiming under C., had the same rights. *Hastings v. O'Mahoney*, 4 All. 305.

*Semble*, That if C. had taken up the note with G.'s money, it would have been extinguished, and he could not have recovered on it. *Ibid*.

**4—Endorser—Original liability—Participation in payments.**

H. gave the defendant a promissory note for the price of goods purchased from him, which note the plaintiff discounted for the defendant, who received the proceeds; when the note became due, it was renewed by H., and the new note endorsed by the defendant and held by the plaintiff. *Held*, That this was only an extension of the time for payment, and did not alter the original liability of the defendant as endorser. *The Commercial Bank v. Williston and another*, 1 *Han.* 283.

Before the renewal of the note, H., who was largely indebted to the plaintiff, as the drawer of a number of other notes, paid the plaintiff a sum of money without making any appropriation of it; he soon afterwards asked the plaintiff to give him credit for it, for the benefit of his endorser; but the evidence left it uncertain whether it was for the benefit of his accommodation endorser only, or for his endorser generally, and a verdict having been given for the plaintiff for the amount of the note, without any deduction on account of the money paid by H., a new trial was granted, in order to ascertain whether the endorser generally were entitled to participate in the payment by H. It being the defendant's duty to establish this fact, the new trial was granted on payment of costs. *Ibid.*

**5—Infant.**

A person after he comes of age is liable in assumpsit upon a note of hand made by him when an infant, if after coming of age he promise to pay it. *Fisher v. Jewett, et al Ber.* 35.

**6—Retiring of original note—Fraudulent substitution—Rights of holder.**

Plaintiff was managing agent of the bank in which the defendant had discounted an endorsed note drawn by himself. When the note fell due, the plaintiff agreed to renew it on payment of a certain sum, and getting another endorsed note for the difference. Defendant brought a renewal



note to the plaintiff—who (believing it to be duly endorsed) gave up the original note ; but, soon afterwards discovering that the renewal note was not endorsed, he called on the defendant to rectify the error, which he refused to do. *Held*, That the original note having been obtained by the defendant fraudulently, it was still constructively in the plaintiff's possession, and he could sue thereon in his own name as holder. *Grover v. Watson*, 6 All. 384.

**7 — Bona fide holder — Failure of consideration between original parties.**

The defendant made a note in favour of S. for the amount of a bill of exchange. S. failed, and the bill was dishonored. Before the note came due, and before the failure of S., it was deposited by him with a number of other notes with the plaintiffs as collateral security for the payment of certain bills of exchange on which he was liable to the plaintiffs, the agreement being, that if the bills were not paid, the proceeds of the notes were to be applied in payment of the amount, but if the bills were paid, the plaintiffs were to collect the notes and place the amount to the credit of S. The amount of notes deposited by S. with the bank as collateral security never exceeded his indebtedness, and at the time the note in question was endorsed to the plaintiffs, and when S. failed, there was a considerable deficiency. *Held*, That the plaintiffs were *bona fide* holders for value, and were not affected by the failure of consideration between defendant and S. *Commercial Bank v. Page*, East. T. 1871.

**8—Executors of Drawer—Insufficiency of original consideration—Equities as against.**

A. made a promissory note payable to his own order, which he endorsed, and gave to his son-in-law B. as a gift by way of advancement to B's wife. After it was due, B. transferred it to the plaintiff for valuable consideration. *Held*, That as the original consideration was not sufficient, it was subject to all the equities in the plaintiff's hands and he could not recover against the executors of A. *Thomas v. McLeod*, 1 Han. 588.

**9—Railway Company.**

The Saint Stephen Branch Railway Co. may take and recover on a promissory note given for amount of assessments on calls due by a stockholder on his shares. *St. Stephen Branch Railway Co. v. Black*, 2 *Han.* 139.

**10—Joint Liability—Separate Interest.**

The jury having found defendants, joint promissors on a promissory note. *Held*, That they were liable although the interest of each in the purchase of vessel might be separate. See *Maynes v. Mahoney and McLean*, 2 *Han.* 23.

**11—Endorsement of name—No endorsement by payee—Liability.**

A party not appearing on the face of a promissory note as a maker, does not by endorsing his name thereon, render himself liable to the payee as a maker of the note. *Smith v. Hill*, 1 *All.* 213.

**12—Not producing or offering to deliver note.**

The maker of a negotiable note is not bound to pay it unless the party demanding payment produces and offers to deliver it up. *Jordan v. Coates*, 2 *All.* 107.

**13—Agent—Authority—Inference.**

The authority of an agent specially authorized to draw a bill of exchange for a particular purpose, ceases on the acceptance, and if the drawer is discharged by want of notice of dishonor, the agent cannot, without further express authority, revive the liability by agreeing to waive the legal discharge. *McGhie v. Gilbert*, 1 *All.* 235.

**14**———The defendants gave a promissory note, which was endorsed in blank by the payee: after it was due it was in the hands of J., who demanded payment of the defendants, but refused to produce it, and a few days afterwards told the defendants' agent, who offered to pay the note, that they should not have it, and he would give them a hunt for it. The defendants afterwards tendered the amount of the note, when J. said he had sold it, but refused

to tell who the holder was, saying the defendants might seek it. On the following day the suit was commenced, and the defendants immediately afterwards paid into the Justice's hands the amount of the note and costs. The plaintiff was J's son, living in the house with him, and there was no proof of any actual transfer of the note by J. *Held*, That it might be inferred that the plaintiff was only the agent of J., and therefore that the jury were justified in finding a verdict for the defendants. *Jordan v. Coates*, 2 All. 107.

**15—Personal liability—Signing note as agent.**

Defendant as Commissioner of The New Brunswick and Canada Railway Company, drew a bill of exchange on the company, to pay for work done on the railway, and signed it "J. J. Robinson, Commissioner." The drawee knew for what purpose the bill was drawn, and that the defendant was the agent of the company. *Held*, In an action by an endorse, that the defendant was personally liable. *Peele v. Robinson*, 4 All. 561.

**16—Recognition of authority—Evidence.**

In an action on a bill of exchange expressed to be accepted "*per procuration*" by the defendant's clerk, evidence was given of a conversation with the defendant in which he stated that A. (the drawer) had drawn a bill on him which the plaintiff held, and that A. ought to pay it, because it was drawn for his benefit. *Held*, Sufficient proof to leave to the jury of a recognition of the clerk's authority to accept. *Morrison v. Spurr*, 3 All. 288.

**17—Endorsement by request—Equities.**

Where a person endorsed his name upon a note at the request of the payee, at the same time informing the payee that it did not render him liable, he is not liable to a party to whom the payee afterwards endorsed the note after it was due. *McQuinn v. Sorrell*, 2 All. 140.

**18—Payee—Recovery on Common Counts.**

The payee of a dishonored bill of exchange may re-

cover the amount from the drawer in an action on the common counts, if no notice of dishonour has been given. *James v. McLean*, 3 All. 164.

**19—Wife—Donatio mortis causa—Assent of Executor—Evidence.**

A man in expectation of death, endorsed a negotiable note specially to his wife and delivered it to her. *Held*. 1. That the wife acquired no right by the endorsement, and 2nd. That it could not operate as a *donatio mortis causa*, the note not being transferable by delivery only. 3d. That the executor's allowing the widow to retain the note for two years and to receive legacies under her husband's will without demanding the note, was no evidence of his assent to her retaining it, he having demanded payment from the maker. *Weldon v. Weldon*, 2 All. 590.

**20—Evidence of Acceptance—Cashier—Instalments.**

A bill of exchange was drawn payable in three instalments. When the first instalment became due, the holder presented it at the bank where it was payable; the cashier paid the first instalment and returned the bill to the holder with the following endorsement, "Paid on the within \$741.00, August 12, 1861." *Held*, An acceptance for the remaining instalments. *Berton v. The Central Bank*, 5 All. 493.

**Banking Company—Mode of Acceptance.**

An incorporated banking company can accept bills as incident to their business, and such acceptance need not be under their corporate seal. *Berton v. Central Bank*, 5 All. 493.

**Initialing of Inland Bill of Exchange, not an Acceptance.**

See Check 2.

III.

PRESENTMENT—DEMAND.

**1—Excuse—Illness of maker.**

In an action against the endorser of a promissory note.

*Held*, That the circumstance of the maker lying dangerously ill will not excuse the want of presentment thereof at his residence or place of business; therefore a presentment to his brother in the street, near the residence, is sufficient. If such presentment could avail under the circumstances, it should be specially alleged. *Nowlin v. Roach*, 2 Kerr 387.

**2—Settled account including note—Evidence.**

In an action on a promissory note payable at a particular place, and a bill of exchange protested for non-acceptance, the only evidence to prove the presentment of the note and protest of the bill, was a settled account between the parties including the note and bill, and a charge for "protested exchange." *Held*, Sufficient to dispense with the preliminary proof of presentment and protest, and that it might be inferred that the protested exchange mentioned in the account referred to the bill in question, it being of the same amount, and no other bill being shewn between the parties. *Bulloch v. Binney*, 1 All. 131.

**3—Protest—Evidence of Presentment, &c.**

In an action against the drawer of a foreign bill, the protest is evidence of an acceptance payable at a particular place, and of due presentment at that place. *Tarratt v. Wilmot*, 1 All. 353.

**4—Sufficiency of Presentment—Endorser.**

A letter written by the attorney of the endorsee to the maker, stating that the note in question, together with other notes, had been placed in his hands for collection, and requiring him to pay the interest, and give new security for the principal, is not such a presentment and demand of payment as would, upon notice thereof, make the endorser liable. This letter was sent on the 4th March, and not being attended to, the note was presented to the maker for payment on the 17th June following, and notice of dishonour given to the defendant as endorser on the 18th. *Held*, That the defendant was liable. *Thorne v. Scovil*, 2 Kerr 557.

**5—Due diligence—Question of law and fact—Jury.**

Whether due diligence has been used in the presentment of a bill of exchange to the drawee, is a mixed question of law and fact; and where the question has been properly left to the jury, the Court will not interfere with their verdict unless it clearly appears that they have come to a wrong conclusion. *Perley v. Howard*, 2 Kerr 518.

**6—Waiver—Question left to Jury.**

Where the defendant, who was the endorser of a promissory note which had not been duly presented to the makers, promised payment thereof, knowing that he had not received due notice of dishonour, and under circumstances from which it might be inferred that he was aware of the non-presentment, and the case had been left to the jury on the point of waiver of both these defects, who found for the plaintiff: the Court refused to disturb the verdict. *Watters v. Lordly*, 2 Kerr 13.

**7—Waiver.**

A subsequent promise by the endorser in ignorance of the defect in due presentment, though he was aware at the time that he was discharged for want of due notice, is a waiver only of the want of notice, not that of presentment. *Nowlin v. Roach*, 2 Kerr 337.

**8—Presentment—Promise—Ignorance of non-presentment—Waiver.**

A bill of exchange was drawn by defendant on T. in Bangor, payable in Boston, and accepted generally by T., who had no place of business in Boston. T. died before the bill was due. There was no presentment in Boston, but presentment was made at T's place of business in Bangor, and answer given that there was no administration and no person authorized to pay acceptances. About six weeks after the bill was due, the defendant wrote to the plaintiff (endorsed) regretting the non-payment, requesting time for payment, and to be dealt leniently with, and offering notes at four and six months, which the plaintiff refused. *Held*, That as it did not appear when defendant

made the offer, he was aware the bill had not been presented in Boston, his promise was no waiver of the presentment. *Dana v. Bradley, East T. 1862.*

### **9—Waiver.**

In an action on a promissory note, payable at a bank to order of maker, and indorsed by him, there was no proof of presentment. *Held*, That a subsequent promise to pay made by defendant admitted that all had been done by plaintiffs to entitle them to recover. *Saint Stephen Branch Railway Company v. Black, 2 Han. 129.*

### **10—Place—Dwelling house—Store closed.**

The maker of a promissory note, who was a merchant residing and carrying on business in the city of St. John, having, before the note became due, closed his store and absconded. *Held*, That presentment at his late dwelling house was sufficient without proof of presentment at the store, or that the store remained closed on the day the note fell due. *Robinson v. Taylor, 2 Kerr 198.*

### **11—Admission.**

The holder of a note swore that he went to the maker's store for the purpose of presenting it for payment, but finding the door locked made a formal presentment at the door. The maker of the note swore that he was at his store at the time stated, and that no presentment was made. The Judge left the jury the question whether the holder had presented the note, and in answer to a question by the jury, told them that for the purposes of the suit such a presentment would be sufficient, no objection on that ground having been made by the defendant. *Held*, That there was no misdirection, and that the jury could not have been misled by the answer to their question. *Reed v. Kavanagh, 4 All. 457.*

An admission by a defendant that he had received notice of dishonour, in the absence of any proof that it was received too late, or any objection made to it, is evidence of its sufficiency. *Ibid.*

**12—Necessity of presentment—Note drawn and payable in Boston.**

*Quære*, Whether, in an action on a note drawn and payable in Boston, it is necessary to prove presentment there, there being no evidence that presentment is necessary by the law of that country. If necessary, it may be waived by a subsequent promise to pay the note. See *Allen v. McNaughton*, 4 All. 234.

**13—Time and place of presentment.**

In an action against the endorser of a note, the plaintiff must show that it was presented at a reasonable hour. *Patterson v. Tapley*, 4 All. 292.

Where a note was payable at a "store," and the only evidence was that when the holder went to present it, the store was closed; and the defendant objected that the presentment was not shown to have been made at a reasonable hour. *Held*, That in the absence of any evidence of the nature of the business carried on at the store, it might be inferred that it was closed in the due course of business, and therefore that the presentment was not made at a reasonable time. *Ibid*.

*Semble*, If no question is raised at the trial about the hour of presentment, and it is proved to have been made on the day the note falls due, it might be presumed to have been made at a proper hour. *Ibid*.

**14—Presentment of a note at the maker's place of business is sufficient, although there is no person there at the time.** *Kinnear v. Goddard*, 4 All. 559.

The maker of a note was proved to have occupied an office up to the 1st May, after which, there was no direct evidence of occupation, but his desk remained there as before. *Held*, In the absence of any proof of his having changed his office, that presentment of a note there after the 1st May, was sufficient. *Kinnear v. Goddard*, 4 All. 559.

**15—Payable at particular place—Time of demand.**

A demand of payment of a promissory note made pay-



able at a particular place, may not be made on the very day it falls due to fix the maker, although there must be a demand at the place upon or after the day, before bringing the action. *Ratchford v. Griffith*, 2 Kerr 112.

**16—Payable “at any Bank”—Place of presentment.**

A promissory note drawn on Boston, where both the maker and payee resided, was made payable “at any bank.” *Held*, That this meant any bank in Boston. *Baldwin v. Hitchcock*, 1 Han. 310.

**17—Necessity of presentment.**

In an action by the payee against the acceptor of a bill of exchange, payable at a particular place, which became due on the 3rd of November, the plaintiff averred presentment for payment on the 2nd. It appeared in evidence that the bill had been presented on the 2nd, and that on the 3rd, the day it became due, the defendant expressly refused to pay it to the plaintiff's agent, who called again, but it did not appear that the note was again produced. *Held*, That proof of presentment on the 3rd was admissible, and that the refusal to pay on the 3rd, rendered the actual presentment of the bill on that day unnecessary. *Chandler v. Beckwith*, Ber. 268.

**17 a—Payable at particular place—Necessity of presentment — Suspension of remedy — Common Counts.**

*See* VI. 12 a.

**18—Pleading.**

*See* VI. 12.

**Laches of presenting draft—Effect of—Direction to Jury by Judge.**

*See* Evidence XII. *Dunn v. Fredn. Boom Co.*

Whether presentment and notice of dishonour must be stated in affidavit for an attachment against an endorser. *See* affidavit III. 10. *Nicholson v. Nowlin*.

## IV.

## NOTICE OF DISHONOR.

*See Bills and Notes III.*

**1—Evidence of.**

Assumpsit by endorsee against drawers of a foreign bill of exchange, drawn by the defendants in this Province, on Duncan Brothers, London, payable sixty days after sight, and returned under protest for non-payment; the declaration averred in the usual form a presentment to, and acceptance by the drawees, presentment for payment, dishonour, protest and notice. There was no direct evidence of acceptance, but on the face of the bill appeared the following words: "Accepted 17th May, 1841, at Messrs. Jones, Loyd & Co.—Duncan Bro's.;" and the protest of the notary public stated that he went with the original aforecopied bill of exchange to the house of Messrs. Jones, Loyd & Co., bankers, where the same drawn upon Messrs. Duncan Brothers is accepted payable, and demanded payment thereof, and was referred to the acceptors, whereupon he went with the bill to the counting-house of the acceptors and demanded payment, whereunto a clerk answered that the said bill cannot be paid. Due notice of the dishonour was given to the defendants, and no objection made in regard to the acceptance. *Held*, That there was sufficient evidence of the dishonour to make the defendants liable. *Irvin v. Crookshank*, 2 Kerr 399.

**2—Presumption of.**

An action by the payee against the drawer of a dishonoured bill of exchange, was discontinued on terms of the acceptor paying the costs, and placing the amount of the bill to the payee's credit with a person to whom he was indebted; and on the representation of the acceptor that this had been done, the bill was given up to him. In trover against the acceptor for the bill (the amount not having been placed to the payee's credit,) the jury were directed that under the circumstances they might presume that the payee had given notice of dishonour to the drawee, and

that the plaintiff was entitled to damages to the amount of the value of the bill at the time of the conversion, which was the amount due on the face of the bill. *Held*, That this direction was right. *McDonald v. Everitt*, 3 Kerr 569.

### 3—Sufficiency of.

A bill drawn in St. John was dishonored in London, on the 16th October, the plaintiff not then being the holder; a mail left Liverpool for St. John on the 19th October, by which the plaintiff could not have given notice of dishonor, but notice was given by the next mail on the 4th November, which was as soon as the defendant was entitled to it. *Held*, That *prima facie* the notice was sufficient and that the plaintiff was not bound to shew that he had received due notice from the holder of the bill at the time of the dishonor. *Tarrat v. Wilmot*, 1 All. 353.

### 4—By whom.

Notice of the dishonor by the cashier of a bank at which a note has been left by the holder for collection is sufficient. *Girvan v. Price*, 309 All. 409.

5—Where a note endorsed in blank, is left at a bank for collection, notice of dishonor may be given by the bank, though it has no interest in the note. *Howard v. Godard*, 4 All. 452.

### 6—Notice by letter—Posting.

Notice of dishonor to the defendant as endorser of a promissory note, put in the office at Saint John, and directed as follows: "Mr. D. D., (the defendant) near Blake's mills, Nashwaak," is not sufficient, without proof that a letter thus directed would probably reach the defendant in due course through the medium of the post office. *Robinson v. Duff*, 2 Kerr 206.

7—In an action against the drawer of a bill of exchange, dated at Moncton—*Held*, That in the absence of any evidence of its locality, or the course of the post with regard to it, the mere putting the letter in the post office at Saint John, containing a notice of dishonour, directed

to the defendant at Moncton, did not afford a reasonable presumption that the letter would reach its destination. *Balloch v. Binney*, 8 Kerr 440.

Where by the copy of a notice of dishonor taken by a copying machine, it appeared to have been directed at the bottom to the defendant. *Semble*, That the letter put into the post office, containing the notice, will be presumed to be directed on the outside the same way. *Ibid*.

**8—Mistake in date of note.**

Notice of dishonor to the endorser of a promissory note is not voided by a mistake in the description of the note, E. G., stating it as a note dated 1st January, 1841, whereas it was dated 1st January, 1840, the note being otherwise correctly described, and there being no other note to which the notice could have applied. *Robinson v. Taylor*, 2 Kerr 198.

**9—Admission.**

An admission by the defendant that he had received notice of dishonor, in the absence of any proof that it was received too late, or any objection made to it, is evidence of its sufficiency. *Read v. Kavanagh*, 4 All. 457.

**10—Place—Change of residence.**

Defendant had resided and carried on business for several years at a place called Brandy Point, and was in the habit of receiving through the post office, letters addressed to him there. *Held*, That a notice of dishonor addressed to him at Brandy Point was sufficient, though he had changed his residence about that time—the plaintiff not being aware of such change, and having applied for information as to his residence, to the payee of the note, with whom the defendant was in the habit of transacting his business in St. John. *The Bank of New Brunswick v. Millican*, 4 All. 254.

**11 — Service of notice — Entry in deceased Notary's book—Residence of party—Presumption.**

Where the endorser of a note (the defendant) and

several of his brothers lived with their mother, and the proof of service of notice of dishonor was an entry in a book by a deceased clerk of a notary, whose business it was to serve notices of dishonor and to make entries thereof in a book, and who had been directed to serve the notice at the residence of the defendant—"served on brother at residence." *Held*, In the absence of evidence that any brother of the defendant had any other residence than at their mother's house, that it was a fair presumption that the notice had been served there, and that the Judge was warranted in leaving it to the jury to find whether it had been duly served. *Canby v. Wright*, 1 *Pug.* 191.

### 12—Time—Waiver.

Where a bill drawn on persons residing in Dublin, Ireland, was protested for non-payment on the 3rd November, 1841, notice thereof to the endorsers, who resided at St. John, in this Province, (where the bill was drawn) on the 22nd December following, was held not to be in due time, it appearing the mails left Great Britain for this Province on the 4th and on the 19th November, and that a notice sent by the mail of the 19th, would have reached St. John about the 4th December. *Bank of New Brunswick v. Knowles*, 2 *Kerr* 219.

An offer to give promissory notes at three and six months for the amount due on the bill, which was not accepted. *Held*, To be no waiver of the laches. *Ibid*.

### 13—Due diligence.

The defendant had a house in Maugerville, where his family lived, and where he resided in the winter; but during the rest of the year—from May till about the end of December—he carried on business at Indiantown, and resided at the house of B., where his notes had several times been presented for payment, and notices of dishonor had been left for him, and which notes he had paid. In January, 1857, a clerk in the bank, who had formerly delivered notices at the same place, left a notice of dishonor at B.'s house, addressed to the defendant, which notice he never

received, having left Indiantown for Maugerville about three weeks before. The Judge left it to the jury whether the holder of the note had used due diligence to ascertain the defendant's residence, and in giving the notice of dishonor. *Held*, per Carter, C. J., Wilmot, J., and Ritchie, J.—(N. Parker, M. R., and R. Parker, J., *dissentientibus*) that the direction was right; and that when reasonable diligence has been used to discover the place to which notice should be sent, and it has been sent accordingly, it proves the averment of due notice in the declaration; but that if, in consequence of the holder being unable to discover the endorser's residence, no notice of dishonor is given, the excuse should be averred. Per N. Parker, M. R.,—that the proper question for the jury was, whether B.'s house was the defendant's residence at the time the notice was left; and if it was not, that the verdict should have been for the defendant, though the plaintiff had used due diligence to ascertain his residence. Per Parker, J., that as B.'s house was neither the defendant's residence or place of business at the time the notice was given, or the place designated by him on the note, the delivery of the notice there, did not prove the averment of notice in the declaration. *Patterson v. Tapley*, 4 All. 529.

#### 14—Dispensation of presentment—Evidence of.

The payee of a note, endorsed it to the plaintiff as security for a debt: on the day the note came due (the maker having in the meantime left the country) the plaintiff went to the endorser and gave him the note, saying he supposed it was of no use to any one, the endorser handed it back to the plaintiff, and told him to keep it for the present. *Held*, That this was evidence of a dispensation of presentment by the endorser. *Masters v. Stubbs*, 4 All. 458.

#### 15—Recovery under common counts, if no notice of dishonor given.

See *James v. McLean*, 8 All. 164.

#### 16—Mistake in name—Time of receiving notice—Admission—Inference for jury.

A notice of dishonor sent through the post office, was

addressed to "Edward T. Price." The defendant, whose name was "Edward Price," admitted the receipt of the notice, but objected to pay because he was an accommodation endorser. *Held*, That the jury might infer that he had received the notice in due time, and therefore that he was liable, notwithstanding the mistake in the name. *Girvan v. Price*, 8 *All.* 409.

**Notice—Averment of.**

See Pleading I., 72. *Bank of Nova Scotia v. Estabrooks*.

**V.**

**DEFENCE.**

**1—Fraud.**

Several of the creditors of the defendant entered into a composition agreement with him, whereby they engaged to accept payment of their debts at certain stated periods, and among the rest, the plaintiff agreed to grant three years for the payment of his debt. *Held*, That the plaintiff could not, before the expiration of that period maintain an action on a promissory note, which he had afterwards induced the defendant to give him for the amount of his debt, payable by annual instalments, but that such note was in fraud of the other creditors. *Willard v. Killman*, 1 *Kerr* 105.

**2—Fraud—Question for jury.**

If in an action against the maker of a promissory note, the defence is want of consideration, and that the note came into the plaintiff's possession by fraud, that question should be left to the jury. *Smith v. Fleming*, 2 *Han.* 147.

3—The endorsee of a bill of exchange, accepted by the defendant, for the accommodation of the payee, and of which there was some evidence of endorsement overdue, having received property from the payee for the purpose of satisfying this bill and others, admitted that he had sufficient property in his hands for that purpose, and promised the defendant to destroy the bill. *Held*, That there was

evidence of a good consideration for the promise, and that the Judge was right in leaving it to the jury to say whether the plaintiff had not, on such consideration, renounced his claim against the defendant on the bill. *Watson v. Porter*, 3 Kerr 137.

#### 4—Consideration.

The plaintiff agreed to sell the defendant all his right and title to the timber growing on a tract of land, which he had agreed to purchase from the Crown, and for which he had paid the principal part of the purchase money, but had not obtained a grant. The defendant cut a portion of the timber for which the plaintiff paid the duties, but the Crown prevented the defendant from cutting the remainder. *Held*, In an action on a promissory note given by the defendant to the plaintiff for the right to the timber, that there was not such an entire failure of consideration as to prevent the plaintiff from recovering. *Clark v. Ash*, 3 Kerr 211.

3———Defendant gave the plaintiff a promissory note for £150, because she thought a deceased brother (whose brother she inherited) would have left the plaintiff as much if he had made a will: a verdict for the plaintiff for £20 was set aside, though there was evidence that the deceased owed the plaintiff about that amount, this debt being no part of the consideration of the note. *McCarrol v. Rear-don*, 4 All. 261.

#### 6—Consideration—Assent of party.

Where the plaintiffs, who were an Insurance Company refused payment of a partial loss to the assured in a marine policy, in consequence of the claims of W. P. & Co., to whom the amount of insurance was in case of loss made payable; but consented to advance the amount, upon the assured giving their promissory note endorsed by the defendant for the sum, which was to be paid at maturity unless they procured the assent of W. P. & Co. to their retaining the money; which assent was refused. *Held*, That the defendant was liable on the note, and could not



defend himself on the ground of want of consideration, or that the plaintiffs were not justified in requiring the assent of W. P. & Co. to the payment of the money for which the note was given. *New Brunswick Assurance Company v. Ansley*, 2 Kerr 196.

7———Defendant gave his note payable at a future day, to the plaintiff, for a debt due from A. to the plaintiff, A. agreeing, in consideration thereof, to convey land to the defendant. A. afterwards refused to convey the land. *Held*, That the giving time for the payment of A's debt was a good consideration for the defendant's promise, and that the plaintiff's knowledge at the time the note was given, of the agreement between the defendant and A., respecting the land, did not affect the plaintiff's right to recover on the note, he not being a party to such agreement. *Moffat v. Duplissey*, 1 Han. 21.

**8—Note for arrears of rent—No authority to lease—Note void.**

The Justices of York were empowered by Act 10 Vic. cap. 7, to lease certain lands by auction, but that no lease should be made unless the rent should have been fixed by the Justices, or till the land should have been sold, or offered for sale at auction. The right of the Justices was transferred to the Corporation of Fredericton, who agreed to lease the land to A., but no lease was executed, and A. died, owing rent; the land was afterwards advertised at auction, but upon the sale, the defendant agreed to take a lease on the same terms that A. held the land, and pay the arrears of rent, for which he gave his note to the plaintiff. *Held*, That they had no authority to lease the land except by auction, and that the defendant was not liable on the note. *City of Fredericton v. Lucas*, 3 All. 583.

**9—Composition—Suspension of action—Fraud.**

Several of the creditors of the defendant entered into a composition agreement with him, whereby they engaged to accept payment of their debts in certain stated periods, and among the rest the plaintiff agreed to grant three years for

the payment of his debt. *Held*, That the plaintiff could not before the expiration of that period, maintain an action on a promissory note which he had afterwards induced the defendant to give him for the amount of his debt, payable by annual instalments; but that such note was in fraud of the other creditors. *Willard v. Killman*, 1 Kerr 105.

#### **9a—Consideration—Composition—Release.**

The defendant assigned to a trustee a portion of his annual income, for the purpose of paying his creditors a composition on the amount of their respective demands, and they covenanted that the payment of the composition should operate as a release of the original debts compounded for; C., one of the creditors, refused to execute the composition deed until the defendant gave him a note for £200, which he did without the knowledge of the other creditors, and after which C. signed as a creditor for £723. *Held*, 1. That the sum stated in the deed must be taken to be the whole amount of C's debt, and therefore there was *prima facie* no consideration for the note, and it was a proper question for the jury whether the alleged consideration was real or not. 2. That the note was a fraud upon the other creditors, and that the plaintiff having become endorsee after it was due could not recover on it, though it would not affect that part of the defendant's income which was assigned for payment of his debts. *McCalmont v. Baillie*, 1 All. 578.

#### **10—Objection—Lateness of to consideration.**

The defendant having given a promissory note to the plaintiff, upon which the defendant's property was attached in the United States, gave a new note with security, in order to get the property released. *Held*, That it was too late to object that the consideration of this note was fraudulent. *Tuttle v. Smith*, 3 Kerr 648.

#### **11—Note over due—Endorsement.**

Where a promissory note made in 1836 at Bangor in the United States, where the maker and payee both re-

sided, payable on demand (without specifying interest), was endorsed about two years afterwards by the payee to the plaintiff at Saint John in this Province, in payment of a debt, and it appeared that the amount of the note had been paid by the maker to the payee at Bangor a few days after the date, but the note had not been given up because the payee then stated it was lost or mislaid; an action having been brought by the endorsee against the maker, in which a verdict was found for the defendant; the Court refused a new trial. *Dougan v. Small*, 2 Kerr 89.

*Semble*, A note payable on demand is, after demand of payment and refusal, to be treated as over-due; and a note whereof payment has actually been made when demanded, cannot stand on a better footing. *Ib.*

### **12—Note over-due—Evidence—Endorser's declarations.**

In an action commenced in the autumn of 1840 by endorsee against C., the maker of a promissory note dated in March, 1835, and payable in the November following, no evidence was given at the trial by the plaintiff of the time and circumstances of the transfer, but the defendant in order to shew that the note had been endorsed over-due, so as to let in evidence of the endorser's declarations, produced a witness who stated that the endorser had in August, 1840, shewed him a note made by C. in his (the endorser's) favour, which he proposed to assign to him in payment of a debt; which note witness believed to be the same as that now in suit, though he could not distinctly identify it; the Judge having refused to admit evidence of the endorser's declarations, and a verdict being found for the plaintiff, the Court granted a new trial on the payment of costs, on account of the staleness of the demand, and the strong presumption that the note had not been endorsed over-due. *Hammond v. Clarke*, 2 Kerr 98.

### **13—Giving time to maker.**

The plaintiff, who was endorsee of certain promissory notes made by J. & H. K., and endorsed by the defendants,

which notes were given in payment of a bill of exchange drawn on persons in England, in the plaintiff's favour, and endorsed by him to J. & H. K., in anticipation of such bill coming back protested, entered into an agreement with J. & H. K. to hold over and return the promissory notes to them in case they took up the bill, with damages and costs, when it came back; the bill came back subsequent to the notes falling due, and the plaintiff was compelled to pay the amount to C. the then holder, J. & H. K. failing to perform their agreement. *Held*, That the agreement amounted to a giving of time to the makers, and that the endorsers were discharged. *Bedell v. Eaton*, 2 Kerr 217.

#### 14—Settlement of Note.

In an action on a promissory note for £30, made by J. B. to defendant, and by him endorsed to the plaintiff, the defence was that the note had been settled between the plaintiff and the maker, the plaintiff having received from him a new promissory note for £132, in which the £30 was included; but it appearing to have been agreed between the parties that the £30 was to stand—the amount when paid to be endorsed on the note: the Court set aside a verdict given for the defendant, and granted a new trial on payment of costs. *Thurgar v. Berry*, 2 Kerr 314.

#### 15—Alteration—Negotiability.

Where, upon a purchase of goods by C. from A., C. agreed to give a promissory note for the amount, endorsed by B., and a note was accordingly drawn and taken to B., who endorsed it; but the words "or order" had been unintentionally omitted, which were afterwards inserted by A. without B.'s privity. *Held*, That an action could not be maintained by A. against B. upon such note. *Lawton v. Millidge*, 2 Kerr 520.

#### 16—Identity.

In an action by the endorsee of a promissory note against the maker, the hand-writing of the attesting witness to the maker's signature, together with the hand-writing of the endorser, were proved, but no evidence was given to iden-

tify the defendant with the person named in the note, and the Judge at the trial, for want of such evidence, non-suited the plaintiff; on motion for a new trial—*Held*, That the evidence given at the trial was sufficient, and accordingly a new trial was granted. *McCullough v. Shields*, 3 Kerr 391.

#### **17—Set off—Appropriation.**

Where the maker of a promissory note delivered the payee a quantity of hay, without making any specific appropriation of the amount towards the paying of the note, and on a subsequent demand of payment claimed no deduction on account of the hay. *Held*, In action on the note, that the value of the hay could only be considered as a set-off, and that the plaintiff was entitled to costs, though the verdict was for less than £5. *Barlow v. Clark*, 3 Kerr 485.

#### **18—Payment—Receipt of rent.**

It is no defence to an action on a promissory note that the plaintiff had had possession of land belonging to the defendant, given as security for the note, and had an opportunity of receiving therefrom rent more than sufficient to pay the note; unless it is shewn that the plaintiff actually received such rent. *Simonds v. Travis*, 2 Han. 14.

#### **19—Security for payment.**

The defendant placed timber in the plaintiff's hands as security for the payment of a promissory note, under an agreement that the timber was not to be sold before 1st November without defendant's consent, but after that day, the plaintiff to be at liberty to sell, after giving the defendant fourteen days' notice: the plaintiff sold the timber after the 1st November, but without giving the notice. *Held*, (Ritchie, J., *dubitante*,) That though the defendant might be entitled to damages in an action of trover, or on the agreement for a wrongful sale of the timber, he was not entitled to credit as a payment, in an action on the note, for more than the proceeds of the sale, though that was less than the highest market value of the timber. *Kinnear v. Ferguson*, 4 All. 391.

**30—Appropriation—Privity.**

It is no defence to an action brought by the plaintiff, a merchant in Liverpool, as endorsee of a bill of exchange drawn by the defendant on one J. W., at Liverpool, and remitted to the plaintiff by his agent at Saint John in paying for moneys collected, that the bill was drawn against a ship and cargo, which the owners had consigned to the plaintiff instead of sending them to J. W., the defendant's agent, as had been originally intended; the plaintiff not having been privy to the arrangement, and having in fact applied the proceeds of the ship and cargo to the payment of other demands which he had against the owner. *Hatton v. Wilmot*, 2 Kerr 324.

**31—Improper drawing—Forgery of signature—Estoppel.**

It is not competent for the endorser of a note to set up as a defence to an action upon it, that the signature of the maker is forged. *McLeod v. Carman*, 1 Han. 592.

**32—Endorsement by one of firm—Authority—Fraudulent endorsement—Bona fide holder.**

In an action by a *bona fide* holder against the endorsers of a note, it is no defence that the note was endorsed by one of the defendants (a firm) fraudulently, without the authority of the other defendants, and for matters not relating to the business of the partnership. *Ibid.*

Notice of such fraudulent endorsement given to the *bona fide* holder of a note will not affect his right to recover, nor will it affect the right of his endorsee though the last endorsement was made after the note was due. *Ibid.*

**33—Release, before maturity of note.**

The holder of a note may discharge the endorser by a general release before the note is due, and such release will be a good defence to an action by a subsequent endorsee. *McLeod v. Carman*, 1 Han. 592.

**34—Statute of limitations.**

To a plea of the statute of limitations in an action by

the endorsee against the maker of a promissory note, the plaintiff replied that when the cause of action accrued to him he was beyond seas, and that he exhibited his bill within six years after his return. Rejoinder, that at the time the supposed cause of action accrued to the plaintiff, he was not beyond seas. *Held*, That the action accrued to the plaintiff when the note was transferred to him, and this being more than six years after it was due, his absence beyond seas was immaterial. *Bradbury v. Baillie*, 1 *All.* 690.

When the statute has begun to run, no subsequent endorsement to a person whether in or out of the Province, will stop it. *Ibid*.

**25**———To an action on a promissory note payable in four instalments, the defendant pleaded that he did not undertake or promise within six years. Replication—that the several causes of action, and each and every of them accrued to the plaintiff within six years, etc., on which issue was joined. *Held*, That though the plea might be bad on demurrer, the proof of the issue was on the plaintiff, and the cause of the action on the two first instalments having accrued more than six years before the action was brought, he could not recover them. *Montgomery v. McNair*, 2 *All.* 31.

**26**———The plaintiff sued on two promissory notes, made by the defendants, while partners in trade more than six years before the commencement of the action; certain payments having been made within six years by one partner after the dissolution of the firm, as also an account in writing stated and signed by him, acknowledging a balance which included what was still due on the note. *Held*, Sufficient to entitle the plaintiff to a verdict against such defendant, and if the respective payments were actually made on the notes, they would be sufficient to take the case out of the Statute of Limitations against both defendants, the Act of Assembly, 6 Wm. IV., cap. 51, having expressly left the effect of payments on the same footing that they were before the passing of the Act. *Sands v. Keator*, 3 *Kerr* 329.

**27—Statute of limitations.**

Assumpsit on three promissory notes; plea, Statute of Limitations. The notes, with several others, were given for land sold to the defendant by the plaintiff as executor of G., whose widow was entitled to the interest of the money for which the land was sold. The defendant, within six years before action brought, paid the widow £4 10s., and directed her to tell the plaintiff to *endorse it on the notes* without mentioning any particular notes, and no notes being produced; no endorsement was made on the notes and there was no positive evidence that the other notes had been paid; but £4 10s. was the annual interest due on the three notes. The jury having found that the payment was made on the three notes—*Held*, That it was sufficient to take the case out of the Statute of Limitations. *Vanwart v. Roberts*, 3 Kerr 572.

**28—Joint payees—Endorsement by one.**

A promissory note made to C. and D. jointly, was endorsed by C. alone to B., and by B. to A. *Held*, That B. was liable as endorser, and could not set up as a defence to an action by A. that D. had not joined in the endorsement. *Thurgar v. Clarke*, 2 Kerr. 370.

*Seemle*, That A. could not have maintained an action against the maker of the note without proving that C. had authority to endorse. *Ibid*.

**29—Extinguishment of original claim—Giving bill—Loss of.**

Declaration in assumpsit on the common counts. Plea, admitting the sum of £526 12s. 4d. to have been due to the plaintiff, averred that for that sum the defendant at Saint Andrews, in this Province, drew his bill of exchange on one C. M., payable to the plaintiff, which was delivered to plaintiff, and by him received and accepted for and on account of the sum so due. Replication—that after the bill of exchange was so received, and before it became due and payable, the plaintiff sent the same by a vessel, of which the said C. M. was master, addressed to the plaintiff's agent in



the West Indies, for the purpose of being presented on the said vessel's arrival, but that the vessel foundered at sea on the passage out, whereby the said C. M., the drawee, perished, and the bill was destroyed and lost, and the plaintiff was unable to present the same, and the same remains wholly unpaid. Special demurrer, assigning for causes that the plaintiff's remedy for the original debt was lost by his taking the bill of exchange, and was not restored by the destruction and consequent non-payment of the bill, as set out in the replication; that the facts stated in the replication were immaterial; that after the receipt of the bill the liability for the original debt was only a secondary liability, and the plaintiff's primary remedy was against the personal representative of the drawee, and that the remedy, if any, was in equity only. *Held*, That the replication was not defective for any of the causes assigned, but afforded a sufficient answer to the plea. *Boyd v. McLauchlan*, 1 *Kerr* 210.

**30**———Plaintiff having an account against defendant and W. K., settled it by taking W. K.'s notes, payable at future days in favor of plaintiff and his partner, and gave a receipt at the foot of the account, stating that he had received payment by the notes (describing them.) *Held*, That the original debt was extinguished by the notes. *Thompson v. Keith*, 6 *All.* 88.

### **31—Satisfaction of debt—Taking bill.**

Taking a bill of exchange is not *per se*, a satisfaction of the debt, but operates only as a suspension of the plaintiff's right to recover on the consideration of the bill, until he has done all that is necessary to procure satisfaction by means of the bill. *Emerson v. Gardiner*, 1 *All.* 451.

### **32 — Extinguishment of debt — Signing composition deed.**

The holder of a note, signing a composition deed, by which he agreed to receive a certain dividend in full discharge of his claim against the maker, extinguishes the

claim on the note, and he cannot maintain any action thereon against the endorser. *Thurgar v. Travis*, 2 All. 272.

### 33—No legal interest.

D. agreed to purchase a vessel from the defendant, and to pay by relieving him of outstanding liabilities, or in approved payments on the transfer of the ship; in order to carry out this contract, D. obtained outstanding notes of the defendant's, by giving his own notes endorsed by W. in the place of them, which notes he transferred to the plaintiff over-due, telling the plaintiff at the time that he had no interest in them, and that they belonged to W. The defendant never transferred the vessel. *Held*, That the jury were properly directed that W. never had possession of the notes, had no legal interest in them, and that the defendant was legally liable on the notes, notwithstanding the agreement about the vessel might have been broken by D. *Raymond v. Wilmot*, 2 All. 80.

### 34—Usury.

A promissory note of £200, made by the defendant to one W. L., and endorsed to the plaintiff, which was affected by usury, was discounted at the Commercial Bank, and payment thereof when due demanded by the bank. The makers paid the bank £25, and the plaintiff the remaining £175; whereupon a new promissory note was given with the same parties as before for £175, on which the present action was brought. The £200 note was given up. *Held*, That it was open to the jury to consider the note for £175 as a new security not affected by the usury in the previous note; and they having found for the plaintiff, the Court refused to disturb the verdict. *Davis v. Chubb*, 2 Kerr 395.

35.—In an action by the endorsee against the maker of a promissory note, there was positive and uncontradicted evidence of usury; but a verdict was nevertheless given for the plaintiff: the Court set aside the verdict, and granted a new trial on payment of costs. *Davis v. Leavitt*, 2 Kerr 397.

**36**———The defendant joined with one H. in a promissory note to plaintiff for the price of goods sold to H. When the note became due, the defendant being called on for payment, gave a new note to the plaintiff, which was tainted with usury, and the old note was thereupon given up. *Held*, That the plaintiff failing on the second note on the ground of usury, could not recover on the first note which had been so given up to the defendant. The usury being clearly proved, the Court set aside a verdict given for the plaintiff on the second note, and granted a new trial on payment of costs. *Turner v. Gilbert*, 2 Kerr 464.

**37**———An agreement to discount a note on condition that the borrower would take part of the amount in bills of exchange, at a premium higher than the cash rate, is *prima facie* usurious; but that alone will not amount to usury if the excess of premium can be ascribed to any real contingency, or was taken as a fair equivalent for any risk incurred by the lender. *Bank of British North America v. Fisher*, 2 All. 1.

**38**———Defendant endorsed a note for the accommodation of S., who gave it to B. to raise money on it: B. applied to the plaintiff who discounted the note, deducting more than the legal interest. *Held*, That it was a loan by the plaintiff, and not a purchase of the note, and therefore the transaction was usurious. *Peters v. Irish*, 4 All. 326.

**39**———In an action by the endorsee against the endorser of an accommodation note, to which the defence was, that the plaintiff in discounting the note had taken usurious interest, the maker of the note proved that he gave to B., a broker, to get it discounted. B. could not identify the note as the one discounted for him by the plaintiff, but said if it was so, the transaction was usurious. A verdict having been found for the defendant, a new trial was refused—there being no evidence of any other note between the parties, and the plaintiff failing to shew that he had not obtained it from B. *Hastings v. Hennigar*, 4 All. 357.

40—The defendant made a note in favour of the plaintiff, which he endorsed in blank, and delivered to the defendant, who transferred it to N., to whom the plaintiff was obliged to pay the amount. *Held*, That the plaintiff could recover on the note as payee, though there was usury in the transaction between the defendant and N., the plaintiff being no party to that, and there being no usury in the inception of the note. *Lawrence v. Hammond*, 4 All. 613. See Act of Assembly 22 Vic. cap. 21, modifying laws relating to usury, limiting interest to 6 per cent., but contracts for more not void as to principal and legal interest.

## VI.

## MISCELLANEOUS.

**1—Damages.**

*Semble*, That the acceptor of a protested bill of exchange, drawn in this country and accepted payable in England, is not liable to 10 per cent. damages under Rev. Stat. cap. 116, in an action brought here. See *Morrison v. Spurr*, 3 All. 288.

**2—Evidence—Declarations of principal.**

In an action against one of the makers of a joint and several promissory note, signed by him as surety for the other maker, declarations of the latter made subsequent to giving the note are not evidence against the defendant. *Palmer v. Wilson*, 3 All. 448.

**3—Note for Liquors.**

In an action on a note for the price of liquors sold, the plaintiff need not prove that he had license to sell. *McAuley v. Lawlor*, 4 All. 600.

**4—Equities—Holder—Payee.**

If a promissory note is endorsed over as a security for advances only, the holder is subject to the same equities as the payee. *Estabrooks v. McKenzie*, C. Ms. 69.

5—Check, if treated as an inland bill of exchange, the initialing by party's cashier does not amount to an acceptance. See Check 2.

**6—Forgery relied on as defence—Consideration not required to be proved.**

In an action on a promissory note for £700 the defence was that the defendant's signature was forged for the plaintiff, and in order to establish this, evidence was given (*inter alia*) of a legacy of £5000, payable by the defendant to the plaintiff's wife, which legacy had been paid independently of the note. The defendant's counsel relied upon the absence of evidence of any other transaction between the parties out of which the note could have arisen, and therefore the apparent want of consideration, as an ingredient to establish the forgery. The Judge left the question of forgery to the jury, who found a verdict for the plaintiff. *Held*, That as the defendant had put his defence on the ground of forgery, the plaintiff was not called upon to prove the consideration, nor was the Judge to leave to the jury whether he had given any consideration for the note. (*See Harvey v. Towers*, 6 *Exch.* 656.) *Mathiavet v. Roach*, *Mich. T.* 1833.

**7—Alteration of note—Evidence when made.**

A joint note made by two persons appeared on its face to have been altered in the date. The note was delivered to the plaintiff by an agent of one of the makers (defendants) in its altered state; the other defendant was called as a witness, and stated that he could not write, or read writing beyond his own name, and could not say that the note had been altered since he signed it. *Held*, Sufficient for the jury to infer that the alteration was made before the note was signed. *Street v. Walsh*, 5 *All.* 343.

**8—Interest recoverable from when.**

A promissory note dated the 24th August, 1857, payable with interest "from first August last," bears interest from the first August, 1856. *Calhoun v. Collpitts*, 5 *All.* 382.

**9—Partnership—Variance—Proof.**

In an action against A. and B. carrying on business in partnership together with C., under the style of A. & Co.,

on a promissory note signed by A. in the name of the firm, the declaration alleged that the note was made by A. and B. under the style and firm of A. & Co.; held no variance. The non-joinder of C. could only be taken advantage of by plea in abatement. *Helly v. Balloch*, 2 Kerr 699.

**10**———In an action by the payees against the maker of a promissory note payable to A. B. C. and D., the declaration alleged that the defendant promised to pay the plaintiffs by the name, style and firm of A. B. C. and D. *Held*, That it was not necessary to prove that the plaintiffs were partners, and that the words "name, style and firm" might have been struck out of the declaration. *Allen v. McNaughton*, 4 All. 284.

**11—Averment—Proof—Special count—Recovery under common count.**

If the holder of a bill of exchange relies upon there being no funds in the hands of the drawee, as an excuse for not presenting the bill and giving notice of dishonour, that fact should be stated in the declaration: and if presentment and notice are averred, they must be proved to enable the plaintiff to recover on the special count. If a bill of exchange is drawn for the balance of an account acknowledged to be due to the plaintiff from the drawer who has no funds in the drawee's hands, the plaintiff may recover the amount upon the count on the account stated, if, in consequence of not alleging the excuse for presentment and notice, he is unable to recover upon the special count. *Emerson v. Gardner*, 1 All. 451.

**12—Payable at particular place—Common Counts.**

In an action by the payee against the maker, a promissory note is admissible in evidence under the common money counts, although it is in the body of it made payable at a particular place; the right of recovery, however, is suspended until presentment be made at the place, on or after the time of payment. *Merritt v. Woods*, Ber. 261.

**13—Particulars referring to note—Evidence.**

Where the declaration contained a count by the plain-

tiff, as endorsee of a note drawn by D. B. in favour of the defendant, and by him endorsed to the plaintiff; with the common money counts; and a bill of particulars had been delivered stating that the action was brought to recover the amount of the note. *Held*, That the plaintiff failing in proof on the count for the note, was not entitled to give evidence under the common counts of an admission by the defendant that he had received funds from D. B. for the purpose of paying the note, and had afterwards promised to pay it. *Tapley v. McHenry*, 2 Kerr 57.

#### **14—Defect supplied by Particulars.**

The omission in a notice of set-off to state that a promissory note, which is otherwise sufficiently described, had been endorsed to the defendant, is not material, where the defect is supplied by the particulars, and the plaintiff has not been misled. *Bugbee v. McDonald*, 2 Kerr 61.

#### **15—Evidence under Common Counts.**

*See Assumpsit. See also Supra 12.*

#### **16—Contribution—Liability for—Satisfaction.**

*See Consideration 8.*

#### **17—Variance—Copy of Summons and Note—Summary process—Variance in—Cannot be taken advantage of on trial if note corresponds with original which is the record.**

*See Steadman v. Holstead*, 3 Kerr 355.

#### **18—Usury, 22 Vic. cap. 21—Recovery of interest—Notice of Set-off—Recovery under.**

The consideration of a note given for a balance found to be due on settlement, where nothing would have been owing had lawful interest been only charged, wholly failed, and defendant is entitled to recover under notice of set-off everything paid above six per cent. *Peters v. Horton*, 2 Pug. 176.

#### **19—Judicial notice—Foreign country.**

The Court will not take judicial notice that a note payable in Boston is payable in the United States. *Cushing v. Gordon*, 6 All. 524.

**Necessary averment of presentment in affidavit.**

*See Affidavit—same case.*

**Award and satisfaction—Whether bill or note taken as such ; a question for Jury.**

*See Evidence XII. Dunn v. Fred. Boom Co.*

**Laches in presenting draft—Creditor making debt his own thereby.**

*See Evidence XII. Ib.*

**Payment of note to one administrator.**

*See Executors, &c., 7. Trueman v. Dixon.*

**Checks.**

*See Check.*

**Want of consideration—Third person.**

*See Agreement 10.*

**Earned premium—Agreement as to payment—Non-maturity of note.**

*See Insurance 42.*

**BOARD OF HEALTH.****Regulations—Not imposing penalty—Omission not invalidating.**

*See Criminal Law 19.*

**BOARDING HOUSE KEEPER.****1—Lien.**

A boarding house keeper has no lien on the goods of a person occupying rooms in his house under an agreement, for non-payment of his bill. *Light v. Abel, Trin. T. 1865.*

**2—Character of keeping left to jury—Pleading.**

In replevin the defendant pleaded that she kept a public boarding and lodging house, with rooms, etc., for the reception, public entertainment, boarding and lodging of all guests, boarders, etc., who might come to her house willing to pay an adequate price ; that the plaintiff was accepted as a guest and boarder in the house for certain reasonable reward, and as such guest brought the goods and chattels



to the defendant's house, and that she kept and detained them for a lien thereon, to insure payment of an account due to her for lodging and entertainment provided for the plaintiff. Replication—*de injuria*. Held, That the replication did not admit that defendant was an inn-keeper, that on the issue raised, it was properly left to the jury to find whether the defendant was an inn-keeper or a lodging house keeper, and whether the plaintiff was received at her house as a traveller, or transient boarder, or as a boarder under a special agreement. *Light v. Abel*, 6 *All.* 400.

**Bodily harm.**

*See Criminal Law.*

**BOOM COMPANY.**

**Power to erect booms—Navigation—Obstruction of.**

The Southwest Boom Company was incorporated by 17 Vic. cap. 10, (Acts of New Brunswick,) for the purpose of erecting booms, &c., and of picking up, securing, and rafting timber and lumber floating down the Miramichi River. By the fourth section of the Act, it is enacted that "the boom or booms shall be so constructed as to admit the passage of rafts and boats, and to preserve the navigation of the river." The Act 17 Vic. cap. 10, was continued in force by 35 Vic. cap. 44, (Acts of New Brunswick,) and further powers were given the company by 37 Vic. cap. 107. At the place where the company erected its boom, the river was about one-third of a mile in width, and of this the company appropriated about fifteen hundred feet for their boom, leaving a space of from one hundred to one hundred and fifty feet on the northern side of the river for the passage of rafts and boats. It does not appear that the river was ever obstructed prior to 1874, but in the spring of that year, in consequence of an unusually large quantity of lumber being in the river, and an extraordinary and sudden rise of water, the whole river at and for a considerable distance above the boom became so blocked up with the lumber brought down by the freshet, that it was impossible for any thing to get through, and the whole navigation of the river was for a time entirely closed. In consequence of

this, the plaintiff was prevented from getting his lumber to market until late in the summer, and from fulfilling a contract to deliver deals at Chatham, and consequently sustained damage. The company contracted with one B. to pick up the lumber coming down the river and put it into the boom, and the latter, for the purpose of facilitating his work, erected what was called a swing-boom, by which the whole open space between the company's boom and the northern shore was completely closed during the principal part of the time. On the trial, the jury were directed that if they came to the conclusion that the Boom Company had constructed their booms in the manner required by the Act, and had left a sufficient space open, and the jam of lumber which obstructed the river was the result of inevitable accident, and of some cause which the company could not control, viz., The sudden and unusual freshet which forced the principal drives down the river sooner than in ordinary seasons, and in such unusually large quantities, that they could not be controlled by ordinary means—then the plaintiff could not recover. Regarding the swing-boom erected by B., the jury were directed that the company was liable for the effect of it. The jury found for the plaintiff. *Held*, that the Acts 35 Vic. cap. 44, and 37 Vic. cap. 107, are not *ultra vires*, that the right to authorize the erection of booms for securing lumber in the rivers of this Province belongs to the Local Legislature; and that the words "navigation" and "shipping" in the 91st section of "The British North America Act" are used in the sense in which they are used in the several Acts of the Imperial Parliament, relating to navigation and shipping, and in the Act of the Parliament of Canada, 31 Vic. cap. 58, viz., as giving the right to prescribe rules and regulations for vessels navigating the waters of the Dominion. *Held*, (by Allen, C. J., Wetmore and Duff, J. J.,) That the direction in regard to the boom erected by B. was correct, and that there was evidence on which the Jury could properly find the company liable for the obstruction thereby occasioned. *Held*, (by Allen, C. J., Weldon, Fisher, and Duff, J. J.,) That the company were bound to protect the navigation of the river against the

effects of all ordinary floods and freshets that might be expected in that part of the country, but not against extraordinary and unforeseen floods and freshets, and that they were not liable for an obstruction to the navigation caused by the *vis major*, and not through their own negligence and improper conduct. *Held*, (by Wetmore, J.,) That the Act of Incorporation should be construed as a contract on the part of the company, and that by this they had undertaken to preserve the navigation of the river, which they were bound to do at all hazards, and that they could not be excused on account of the *vis major*. *Held*, (by Weldon and Fisher, J. J.,) That the finding of the jury was against the weight of evidence, and that there should be a new trial on payment of costs. *McMillan v. Southwest Boom Co.*, 1 P. & B. 715.

### BOOMAGE.

#### Liability to Payment of.

The Act 10 Vic. cap. 72, authorized The South Bay Boom Company, to erect booms and piers between certain points on the River St. John, for securing timber, logs, etc., and the 15th sect. authorized them to receive certain boomage on all timber, logs, etc., which should be "carried or received, or which should enter into or within said piers or booms." *Held*, That the owner of a saw mill at the mouth of a stream within the bounds of the boom, and whose free access to the River St. John was partially obstructed thereby, had no common law right as a riparian proprietor, to pass logs through the boom to his mill, without payment of boomage; and that as he came within the words of the Act, there was no implied exemption from the charge imposed by the 15th sec. of the Act. *South Bay Boom Co. v. Jewett*, 5 All. 267.

### BOND.

#### I.

#### PARTICULAR BONDS.

A. LIMIT BOND.

B. BAIL BOND.

C. REPLEVIN BOND.

D. ADMINISTRATION BOND.

E. ARBITRATION BOND.

F. SHERIFF'S BOND.

G. MISCELLANEOUS.

#### A. LIMIT BOND.

##### 1—Limit Bond—Defence—Action by Sheriff.

In an action of debt brought by a Sheriff upon a limit bond under 10 and 11 Geo. IV. cap. 30, it is a good defence to shew that the Sheriff had received the defendant again into close custody either on being rendered by his bail or by such defendant rendering himself in discharge of his bail, but *non-damnificatus* is not a good plea except only where the bond is merely to indemnify. *Campbell v. Henan et al Ber. 72.*

##### 2—Assignee of.

In an action by the assignee of a bond for the gaol limits, it is a fatal objection, even on motion for arrest of judgment after verdict, that it does not appear on the record that the assignee was the plaintiff in the suit on which the bond was taken, there being nothing to render proof of that fact necessary on the trial of the issue. *Seemle*, The declaration should state the writ on which the defendant is in custody when the limit bond is taken. *Cameron v. Beardsley, 2 Kerr 598.*

##### 3—Damages—Assessment.

In an action on a limit bond, the damages may be assessed by the jury; and the proper rule of damages when the bond has been taken from a person in custody under execution is the amount of such execution. *McKenzie v. Marsh, 2 Kerr 629.*

(See Nos. 10, 15.)

##### 4—Limits of Gaol—Prisoner going beyond.

The Act 6 Wm. IV. cap. 41, authorized the Justices of

the Peace in the several counties to designate certain gaol limits, not to be less than 40 rods nor to exceed 160 rods from any gaol: the Justices of C. made an order that the gaol limits of that county should extend to 160 rods from the gaol, and that the sheriff should cause the same to be defined and designated by erecting posts at the extremities. In pursuance of this order the sheriff marked out limits in 1837, which had been since acted upon. *Held*, That a limit bond taken in reference thereto, was not forfeited, though the posts erected were afterwards found to be 174 rods distant from the gaol, and the prisoner had gone beyond the 160 rods, but not beyond the posts—it not appearing that he was aware of the excess. *Boyd v. Kennedy*, 1 *All.* 624.

Persons entering into a limit bond are not required to make a measurement to ascertain that the limits marked out by the Justices are in due conformity to the law. *Ibid.*

#### **5—Payment of Sheriff's fee upon—Taking.**

Payment of Sheriff's fee is necessary to the completion of limit bond, and the Sheriff is not bound to discharge defendant from gaol and give him the benefit of the limits without such fee being paid. *See Caldwell v. Winslow*, 2 *All.* 203.

#### **6—Validity of—More than double amount—Non est factum.**

A limit bond taken under the Act 6 Wm. IV. cap. 41, for more than double the sum for which the execution issued, is valid; though if the penalty was unreasonable the obligor might be relieved by the Court. *Forster v. Pine*, 2 *All.* 215.

#### **7—Defence—Non est factum—Different Court.**

It is no defence under a plea of *non est factum* in an action on a limit bond, that it was brought in a different Court than that in which the original action was brought. *Ibid.*

**8—Court—Suit.**

An action on a limit bond need not be brought in the Court in which the suit in which the bond was given was brought. *James v. Roach*, 6 *All.* 28.

**9—Taking assignment of first bond—Insufficient sureties—Taking second bond.**

M. being a prisoner on the limits, escaped without the knowledge of the sheriff or the plaintiff, but returned again to the limits, and the sheriff being dissatisfied with the sureties, took a new limit bond: the plaintiff afterwards, (knowing that the second bond had been given) took an assignment of the first bond, brought an action thereon, and recovered a verdict for the debt and costs in the original suit. *Held*, That he could not afterwards consider M. as remaining a prisoner on the execution, and take an assignment of the second bond and proceed thereon for the escape, even though the sureties in the first bond were insufficient. *Goodwin v. Murray*, 3 *All.* 595.

Taking a second limit bond is no defence to an action for a previous escape, unless the plaintiff consents to waive such escape. *Ib.*

**10—Action by assignee—Common Venire—Assessment of damages.**

In an action by the assignee of a limit bond, to which *non est factum* is pleaded, the common *venire* to try the issue, is sufficient; and the plaintiff need not have damages assessed, but may take a verdict for nominal damages, and issue execution for the amount of his debt. *McElroy v. Getty and another, impleaded with Ellis*, 1 *Han.* 261.

**11—Assignee—Action by—Proceedings to be set forth.**

In an action by the assignee of a limit bond, it is necessary to set forth in the declaration the proceedings in the original action in which the defendant was in custody. *Baxter v. Sime*, *Hil. T.* 1833.

**12—Defence—Action on a limit bond—Second arrest after voluntarily allowing to go at large.**

If a judgment debtor arrested on a *ca. sa.* is voluntarily

allowed by the creditor to go at large, he cannot be arrested again on a new *ca. sa.*; and if he should be so arrested, and give bail for the limits, these facts will be a good answer to an action on the limit bond for an escape. *Andrews v. Dervdall*, *Trin. T.* 1832.

**13—Order for discharge not served.**

An order for the discharge of an insolvent debtor from the limits, not served upon the sheriff, nor acted upon by him, is no answer to an action on the bond for the escape of the debtor. (Wilmot and Ritchie J. J., *dissentiente*.) *James v. Roach*, 6 *All.* 28.

**14—Escape—Different county—Judge's warrant—Limit bond—Sheriff no right to take.**

A debtor in custody of the sheriff of Carleton on a *ca. sa.* escaped into the County of York, and was there arrested under a Judge's warrant for the escape and committed to the custody of the sheriff of York who gave him the limits. *Held*, That the sheriff had no right to take a limit bond; and the party being at large, the Court refused either to set aside the Judge's warrant, or to cancel the limit bond. *Ex parte Haines*, *Hil. T.* 1862.

*See Bail.* (Relief.)

**15—Extension of limits by Act 30 Vic. cap. 28—Previous regulations.**

The Act 30 Vic. cap. 28, extending gaol limits to the whole County, repealed the regulations establishing gaol limits passed prior to that Act. *Regina v. Ferguson*, 1 *P. & B.* 3.

(Above Act was repealed before coming into operation).

**B BAIL BOND.**

**16—Executor of assignee may maintain action—Evidence—Execution issuing—Amount.**

The executor of the assignee of a bail-bond may bring an action upon it. *Scribner v. Gibbon*, 4 *All.* 182.

In an action by the assignee of a bail-bond where the only plea is *non est factum*, the plaintiff need not give any

evidence of the original cause of action; but on proof of the execution of the bond, he is entitled to a verdict with nominal damages, and if execution issues for more than the debt due and costs, the defendant may be relieved by application to the Court. *Ibid.*

#### **17—Erasure in—Avoidance.**

Where in an action on a bail bond there was an erasure in the condition, and the name of the plaintiff in the suit appeared to have been altered, and there was no evidence when the alteration was made. *Held*, That this avoided the bond. *Weeks v. Hall*, *Hil. T.* 1834.

#### **18—Assignment of—Witnesses—County Court Act.**

The bail bond given to the Sheriff in the case of a *capias* issued out of the County Court, being assignable by virtue of the County Courts Act, the Statute of Ann, relating to the assignment of bail bonds, has no application, and it is not necessary that the assignment should be made in the presence of two credible witnesses. *Smith et al, assignees, &c., v. Smith*, 2 *Pug.* 420.

#### **Setting aside of.**

*See Practice VI. 57. Lewis v. Weldon.*

### **C REPLEVIN BOND.**

#### **19—Form of.**

A replevin bond not in form given by the Rules of Court, *Mich. T.* 4 *Vic.* is bad. *Pollock v. Gardner*, 2 *Kerr* 655.

#### **20 — Breach — Delay in prosecuting — Assignment — Form.**

A tenant replevied goods distrained for rent in November, 1858; the landlord appeared, and the cause was entered for trial at the Circuit in May, 1859, but the plaintiff not appearing when it was called on, it was struck off the docket. *Held*, That this was a breach of the condition of the replevin bond, to prosecute without delay. The breach of the bond is necessarily a damage. *Steen v. Hanson*, 4 *All.* 459.



A replevin bond may be assigned on the request of the attorney of the defendant in the action of replevin, and may be given by the sheriff to his deputy to be delivered to the assignee. *Ibid.*

It is no ground for arresting the judgment in an action on a replevin bond, that the bond as stated in the declaration, is not in the form prescribed by the Act, if the bond itself is correct. The variance might be amended even after notice of motion to arrest the judgment. *Ibid.*

### **21—Pleading—Excuse for breach.**

In an action by the assignee against the obligors of a replevin bond, the breach alleged was that the obligors did not appear at the day mentioned in the condition of the bond (Michaelmas term), and prosecute the suit with effect and without delay. Plea, that the defendant in replevin did not appear at the return of the writ (the second Tuesday in October), and in order that the plaintiffs might prosecute their suit according to the condition of the bond, they sued out a process against the defendant, returnable in Easter term, to which the defendant had appeared, and that the suit was at issue and being prosecuted with effect and without delay. *Held*, on demurrer, That the plea shewed a sufficient excuse for the plaintiffs breach; it not being specifically objected by the demurrer that they had not issued process against the defendant on the return of the writ of replevin, or within twenty days after. *Williams v. The St. Andrews Steam Mill Company*, 1 All. 580.

### **22—Claim of property—Inquisition—Breach—Immaterial mistake in name.**

If a defendant in replevin claims property in part of the goods replevied, and the property is found in him on an inquisition under a writ *de proprietate probanda*, this constitutes a breach of the replevin bond, and entitles the defendant to an assignment of it, in order to recover the costs of the proceeding. *Berry v. Mitchell*, 2 All. 380.

*Quere*, As to the disposition by the sheriff of the goods not claimed by the defendant. *Ibid*.

Property replevied was claimed by the defendant in the name of "Barry" instead of "Berry;" the property was found to be in the claimant, and the bond was assigned to him by his proper name. *Held*, That the mistake was immaterial. *Ibid*.

**23—When bond cannot be assigned to defendant.**

When on a writ *de proprietate probanda*, the finding is for the defendant, the replevin suit is terminated and the replevin bond cannot be assigned to the defendant. *Pollock v. Gardiner*, 2 Kerr 655.

**24—One surety only—Objection cannot be taken by plaintiff.**

A replevin bond with one surety is sufficient, and may be assigned. Though the sheriff might object to take such a bond, or the defendant in the replevin suit to take an assignment of it, the plaintiff in the suit cannot take the objection. *Taylor v. Burpee*, 5 All. 191.

**25—Handwriting—Proof—Assignment—Request—Defendant's attorney.**

In an action by the assignee, proof of the obligor's handwriting is sufficient, without calling the subscribing witness. The bond may be assigned at the request of the defendant's attorney. *Ibid*.

**26—Action on bond—Prosecute without delay—Against whom.**

Defendant M. issued a writ of replevin against B.;—the present plaintiff put in a claim of property but no writ *de prop. probanda* was issued. The plaintiff afterwards appeared in the replevin suit, but M. did not proceed therein, whereupon the plaintiff took an assignment of the replevin bond and brought an action thereon for not prosecuting the replevin. *Held*, Bad in arrest of judgment—the condition of the bond being that M. should prosecute the suit without delay, etc., against B., and not against the plaintiff. *Smith v. Millar*, 6 All. 386.

**27—Staying proceedings—Power of Judge—Damages.**

The provision in the Act 4 Wm. IV. cap. 38, authorizing the Court to give relief in actions on replevin bonds, having been omitted from the Act. 13 Vic. cap. 53, which repealed the former Act, a Judge has no power, except under special circumstances, to stay the proceedings in such an action; where it is brought for the breach of the condition of the bond, to prosecute the replevin suit without delay, and the plaintiff's proceedings are regular, the Court will not enquire whether the defendant in the replevin suit has, or has not sustained damage by the breach of the bond. *Betts v. McGowan*, 1 *Pug.* 155.

**28—Third party claiming property—Effect of assignment of bond and recovery by.**

*Quere*, Whether in replevin, where a third party claims the property and his claim is found good, and he takes an assignment of the bond and recovers upon it, that satisfies the bond, or whether it can afterwards be assigned to defendant in the suit, in case he recovers judgment, or if plaintiff fails to prosecute the action? *Wheeler, assignee, &c., v. Stewart*, 3 *Pug.* 398. See Replevin 41. *Vanwart v. Shepherd*.

**29—Allegation of damage—Pleading to.**

Where a replevin bond is assigned to a claimant, in consequence of his claim of property being found good, and an action is brought on the bond, an allegation of special damage cannot be pleaded to, because plaintiff is entitled to recover nominal damages on proof of the finding in his favour, and damages are not the gist of the action—per Allen C. J., and Weldon, Fisher, and Duff, J. J.—Wetmore J., *dubitante*. *Wheeler, assignee, v. Stewart*, 3 *Pug.* 398.

In an action on replevin bond, the property in the goods replevied cannot be put in issue; neither can the validity of the inquisition of the Sheriff's Jury under a writ *de pro. prob.*, which becomes a *quasi* record, be tried in such an action. *Ib.*

**30—Staying proceedings—Power of Court or Judge.**

The provisions in the Act 4 Wm. IV. cap. 38, authorizing the Court to grant relief in actions on replevin bonds having been omitted from the Act 18 Vic. cap. 53, which repealed the former Act, the Court or Judge has no power to stay proceedings in such an action where it is brought for the breach of the condition to prosecute the replevin suit without delay, and the plaintiff's proceedings are regular. The Court cannot adjudicate in a summary way, as to say that no damages have resulted. The controlling power of the Court over proceedings in suits can only be exercised where special circumstances arise to warrant it. *Betts, assignee, &c., v. McGowan et al*, 1 Pug. 155.

**31—Several plaintiffs.**

Where there are several plaintiffs in replevin, it is not necessary that more than one should join in the bond to the sheriff. *Wheeler, assignee, &c., v. Harding*, 3 Pug. 398.

**32—To whom bond assignable.**

A replevin bond conditioned to prosecute the suit against C. D.—(the defendant named in the writ of replevin)—“or some other person,” cannot be assigned under the Replevin Act—per Allen, C. J., and Wetmore and Duff, J. J. *Weldon and Fisher, diss. Ib.*

**D ADMINISTRATION BOND.****33—Application to put in suit.**

In an application to put an administration bond in suit, the Court will not determine whether there has been a breach of the bond. If the applicant make out a *prima facie* case of breach, and that he is a proper person to sue for it, he is entitled to an assignment. *In re Hunter*, 1 Han. 283.

An assignment will not be refused though there is a variance between the bond and the form given by the Act. *Ibid.*

The counsel moving for the assignment is not bound to shew that he is authorized to make the application. *In re Hunter*, 1 Han. 283.

It is sufficient to shew the substance of the proceedings against the administrator in the Probate Court without producing a copy of them. *Ibid.*

**34—Breach—Non-payment of debt.**

The non-payment of a debt does not, *per se*, constitute a breach of an administration bond, "well and truly to administer according to law" the goods and chattels of the intestate. *Sherlock v. McGee*, 1 *All.* 116.

**35—Devastavit—Requisite statement.**

In an action on an administration bond under the Act 3 Vic. cap. 61, assigning as a breach a devastavit by the administrator, it must be stated that the estate of the intestate has sustained injury thereby to a certain amount. *Sherlock v. McGee*, 1 *All.* 346.

An allegation in the assignment of a breach that good and chattels came to the hands of the defendant *as administrator*, necessarily shews that they were the goods of the intestate. *Ibid.*

*E* ARBITRATION BOND.

**36—Revocation.**

One of two persons on the same side may revoke a joint submission to arbitration, and such revocation will be a forfeiture of a joint and several bond by both, conditioned to stand to, obey and perform the award. *Hatheway v. Cliff*, 2 *All.* 267.

**37—Breach—Pleading.**

Particular breach in bond for performance of award, must be stated in declaration. *See* Pleading I. 43.

*F* SHERIFF'S BOND.

**38—Action on.**

In an action brought on bond given by sheriff under Rev. Stat. cap. 131, (Consol. Stat. cap. 125,) it is not necessary that it should appear on the face of the judgment obtained against the sheriff that the action was brought for a breach of the duties of his office; and it is sufficient if such breach of duty is set out in the action on the bond and proved.

Where a sheriff is directed to levy under a *fi fa* a certain amount, and he seizes and sells for a greater sum, he is guilty of a breach of the duties of his office, and his sureties are liable on bond given under statute. *Miller v. Weldon*, 2 *Pug.* 227.

#### G MISCELLANEOUS.

#### **39—Impeached for fraudulent representation—What defendant may prove.**

Where a bond given for the purchase money of a lot of land, is impeached for fraud, on the ground that there was a fraudulent representation at the time of the bargain, and previous to the giving of the deed, as to a parcel of land included in the purchase, it must be affirmatively shewn as one of the requisites of such a defence, that the deed does not in fact contain the land bargained for. *Sisson v. Merithew*, 3 *Kerr* 284.

#### **40—Escrow—Non-execution by one of the obligors.**

The condition of a bond recited that five persons named as obligors, had agreed to secure the payment of a sum of money to the plaintiff; one of the persons named did not execute the bond. *Held*, That in the absence of any circumstances attending the execution, beyond the mere fact of one of the parties named not having signed it, there was not sufficient evidence to be left to the jury that the bond was delivered as an escrow. *Held also*, That it was the joint bond of the obligors who executed it, and that the omission of one of the persons named in the bond to execute it, did not render it merely the several bond of each obligor who did. *Keator v. Scovil*, 3 *Kerr* 647.

#### **41—Crown bond—Neglect to enforce payment—Sureties—Application for relief.**

One of the conditions of a bond given to the Crown by a deputy postmaster, required him to give three months' notice to the postmaster-general of his intention to resign his office, and to pay all sums of money chargeable against

him as postmaster. At the time of his resignation, a postmaster was a defaulter, and died insolvent, about twenty-one months after. No proceedings were taken against him to enforce payment, though he was applied to several times, and promised payment, and no notice of his indebtedness was given to his sureties till after his death. *Held*, That his sureties were not entitled to be relieved from the bond under the 33 Hen. VIII. cap. 39, sec. 79. *The Queen v. Hammond and another*, 1 Han. 38.

**42—Corporation—Bond to — Condition — Notice—Seal of company—not necessary.**

*See* Principal and Surety 1,

**43—Obligees—Action by one.**

A bond conditioned for the payment of money to A. or B., or either of them, cannot be sued on in the name of one of the obligees, unless the other is dead. *See Hazen v. Drummond*, 4 All. 267.

**BASTARDY BOND.**

**Action on.**

*See* Action at Law X. 6.

**BOND AND WARRANT OF ATTORNEY.**

*See* Warrant of Attorney.

**BOUNDARY.**

*See* Crown Grant.

**BOUNDARY LINES.**

**1—Agreement as to—Binding operation.**

Where the respective owners of adjoining lots agree by parol to a division line, it is binding upon them, though it may differ from a line to which they had previously occupied. *Lawrence v. McDowell*, Ber. 283.

2—Where a boundary line has been run between adjoining proprietors of land by a surveyor mutually employed by them and acted upon for a number of years, and conveyances made according to it, it is binding upon them

though it was incorrectly run and deviated from the description in the deeds under which they held, and gave one of the parties a much greater quantity of land than he was entitled unto. *Doe dem Carr v. McCullough*, 1 Kerr 460.

**3**—Running and marking a line by one party, not in accordance with the true line between adjoining grants, having only been assented to on the condition that the true line should be ascertained and run, cannot establish it as a conventional boundary until it is acquiesced in and acted on by both parties. *Bevier v. Govane*, 4 All. 144.

**4—Ascertained marks—Controlling courses.**

Where the side line of a grant to H. was described as north 107 chains, or to the northwesterly angle of A's grant, such angle being capable of being ascertained, controls the course and distance of the side line of H's grant. *Hanson v. Mahoney*, 2 Han. 11.

**Dispute as to boundary—Question for Jury.**

*See* Trespass II. 29.

**BREACH.**

**Bond.**

*See* Bond.

**Particular breach in bond for performance of an award must be stated in declaration.**

*See* Pleading I. 48.

**Arbitration bond.**

*See* Bond 27.

**Covenant.**

*See* Pleading I.

**Scire Facias on inquisition.**

*See* Practise IV. 3.

**BREACH OF AGREEMENT.**

*See* Agreement.

**1—Unpaid instalment—Damages—Cross action.**

In an action for breach of an agreement to convey property to the plaintiff on payment to the defendant of a sum



of money by instalments, and which agreement the defendant had disabled himself from performing, before the last instalment was due. *Held*, That the plaintiff not having paid the last instalment, could not recover it as part of the damages for breach of the agreement. Being part of the same transaction, the defendant is entitled to have the unpaid instalment deducted, and is not driven to bring a cross action for it. *Gilbert v. Campbell*, 2 *Han.* 55.

## **2—Partial breach—Action.**

Where goods are delivered under an agreement to be paid for by endorsed notes payable — days after delivery, the vendor may, before the expiration of the term of credit, sustain an action against the vendee for a partial breach of his agreement, the vendee having in part paid for the goods according to agreement. *Brown v. Frink*, *Ber.* 363.

## **BREAKING OPEN DOORS.**

Raising a window whereby a constable was enabled to reach and unbolt the door on the inside of the house, and thereby enter it, is a breaking. *Smith v. Burpee*, *Mich. T.*, 1872.

*See Distress.*

Notice of Action.

Criminal Law.

Constable.

**Breaking into field under lawful fence—What does not constitute.**

*See Trespass II.* 2.

## **BRIBERY AND CORRUPTION.**

*See Election Law.*

## **BRITISH NORTH AMERICA ACT, 1867.**

### **1—Provincial Legislatures—Powers of—Insolvency.**

Insolvency being one of the subjects upon which the exclusive right to legislate is vested in the Parliament of Canada, the Legislature of New Brunswick has no right to

pass an Act relating thereto, since the "British North America Act" came into force. *Reg. v. Chandler*, 1 *Han.* 548.

## 2—Imprisonment for debt.

The Act 33 Vic. cap. 22, relating to imprisonment for debt, does not come within the prohibition of the 91st sec. of the British North America Act, 1867, paragraph "Bankruptcy and Insolvency." *Valentine v. Hazleton*. Equity 1870.

(See Practice in Equity 22. Same case.)

## 3—Railways.

The Provincial Act 33 Vic. cap. 47, authorizing the issue of Debentures to the Houlton Branch Railway Company, to aid in the construction of a railway from Houlton, in the State of Maine to the New Brunswick and Canada Railway in this Province. *Held*, To be beyond the powers of the local Legislature under the "British North America Act, 1867." See 92. Sub sec. 10. *Ex parte Marks*, *Hil. T.* 1872.

See *Infra* 13. *Regina v. Dow*.

4——— Plaintiffs were incorporated in 1851 by an Act of the Legislature of New Brunswick for the purpose of constructing a railway from St. John to the boundary of the United States; the stock not having been subscribed, nor the assessments on the stockholders made according to the conditions of the Act, and it being doubtful whether subscribers for stock were liable to pay the calls, another Act (32 Vic. cap. 54) was passed to obviate the objections—declaring in what manner the subscribers for stock should be liable. *Held*, That this Act was not beyond the powers of the local Legislature under "The British North America Act." See 92. Sub Sec. 10. *E. and N. American Railway Co. v. Thomas*, *Hil. T.* 1872.

## 5—Branch Pilots St. John—Regulations—Authority to make.

By Act 3 Vic. cap. 70, the Corporation of Saint John

was authorized to make laws and ordinances for the regulation of the Branch Pilots of St. John. Under this authority by-laws were made before the passing of "The British North America Act, 1867." Afterwards, in 1869, the Corporation made another by-law relating to pilots. *Held*, That the regulation of pilotage belonged to the Parliament of Canada under the 91st section of the British North America Act, and (per Ritchie, C. J., Allen and Weldon, J. J. that after that Act came in force, the powers of the Corporation to make by-laws relating to pilotage ceased, and therefore the by-law of 1869 was *ultra vires* (per Fisher and Wetmore, J. J.) that under the 129th Section of the British North America Act, the power of the Corporation to make by-laws under the Act 3 Vic. cap. 70, was continued until the Parliament of Canada legislate on the subject, and therefore the by-law was valid. *Reg. v. Peters*, *Hil. T.* 1873.

**6—Discharge from imprisonment—Insolvent Act—Trader.**

Defendant was in custody on the first of October, when the Act 37 Vic. cap. 7, abolishing imprisonment for debt came in force, and applied for his discharge under the Act. It was objected that the Act was *ultra vires*, but the Court held otherwise—limiting their decision, however, to the present case, in which it was shewn the defendant was not a trader and not subject to the Insolvent Act of 1869. *Armstrong v. McCutchen*, 2 *Pug.* 381.

**7—Act of Provincial Legislature altering gaol limits.**

An Act of a Provincial Legislature altering the law establishing gaol limits, does not so relate to insolvency as to be *ultra vires* under British N. A. Act. *McAlmon, assignee, &c., v. Pine*, 2 *Pug.* 44.

**8—Imposing fines for selling liquor without license.**

An Act of the Local Legislature, passed since Confederation, imposing fines and penalties for selling liquor, is not *ultra vires*, and although there may be a question as to the

power of the Local Legislature to direct the manner in which the fines may be recovered, the excess only—that is, the mode of recovery would be void. *Regina v. McMillan*, 2 *Pug.* 110.

### **9—Liquor—Prohibiting sale of.**

A Local Legislature has no power since the British N. A. Act, 1867, to pass a law directly or indirectly prohibiting the manufacture or sale or limiting the use of spirituous liquors. *Regina v. Justices, &c., of Kings Co.* 2 *Pug.* 535.

### **10—Sale of spirituous liquors.**

The Local Legislature has no power directly or indirectly to prohibit the sale of spirituous liquors, such power belonging exclusively to the Parliament of Canada. *Ex parte Mansfield*, 2 *P. & B.* 56.

### **11—Imprisonment—Order of Judge.**

Sub-sections one and two of section thirty two, Consol. Stat. cap. 38, under which a Judge may make an order to imprison the defendant in case (1) that he has had since the date of the judgment or order the means to pay it, and neglects or refuses to pay, or in case (2) the liability was incurred by obtaining credit under false pretences, or by means of any other fraud, or by the commission of an act for which the person in default might be proceeded against criminally. *Held*, not *ultra vires* (per Allen, C. J., Fisher, Wetmore and Duff, J. J., Weldon J. dissenting. *Ex parte Ellis*, 1 *P. & B.* 598.

### **12—Trade and commerce—Interference with.**

The Act 38 Vic. cap. 88, authorizing the Mayor of Fredericton to grant to any person wishing to engage in any trade, profession, occupation or calling in the city, a license to engage therein, is not *ultra vires* as being an interference with trade or commerce.

A commercial traveller is engaged in an occupation or calling and comes within the Act. *Ex parte Fairbairn*, 2 *P. & B.* 4.

### **13—Railways—Debentures—Foreign Country.**

The Provincial Act 38 Vic. cap. 47, authorized the issue

of debentures to the Houlton Branch Railway Company, to aid in the construction of a railway from Houlton in the State of Maine, to the New Brunswick and Canada Railway in this Province. *Held*, (per Ritchie, C. J. and Allen and Weldon J. J., Fisher J. dissenting), To be beyond the powers of the Local Legislature under the British North America Act, 1867. *Regina v. Dow*, 1 *Pug.* 800. (In this case judgment was reversed on appeal to Privy Council.) See Privy Council Appeals, vol. VI., L., R., page 272, *Dow*, *appellant*, *Black*, *respondent*.

#### **14—Parish Courts—Appointing Commissioners of.**

The Act 39 Vic. cap. 5, (Consol. Stat. cap. 59) establishing Parish Courts, provides by section 1, that Commissioners shall be appointed by Lieutenant-Governor in Council. *Held*, per Weldon, Fisher and Wetmore J. J., Allen C. J. and Duff J. dissenting: That the section 1 is not *ultra vires* of the Local Legislature. *Ganong v. Bayley*, 1 *Pug.* 324.

#### **Booms—Erection of, on navigable rivers.**

See Boom Company.

#### **Fishery—Lease of.**

See Fishery.

#### **Costs in actions against Justices.**

*Quære*, Whether the Dominion Act 32 and 33 Vic. cap. 29, sec. 134, relating to costs against Justices, is not *ultra vires* the Federal Parliament. *Whittier v. Debble*, 2 *Pug.* 243.

#### **Private property—Power of Dominion Parliament to legislate respecting—Quære.**

See *Davidson v. King*, 2 *Pug.* 526.

#### **Acts of Local Legislature relating to attendance of Grand and Petit Jurors in criminal matters in County Courts are not ultra vires.**

See County Court 10.

**Provisions for non-Sectarian Schools—Common School Act.**

*See* Common School Act.

**Private property—Railway Act—Interference with.**

*See* *Davidson v. King*, 2 *Pug.* 526.

**Operation of Insolvent Act upon property.**

*See* Insolvent Act. *McLeod v. McLeod*.

**BRITISH STATUTES.****I—Statutes not in force in New Brunswick.**

The Act of Parliament 7 Geo. II., cap. 20, authorizing a stay of proceedings in ejectment on a mortgage, on payment of the debt and costs, does not extend to this Province. (But see 2 Wm. IV. cap. 23, sec. 3.) *Doe dem Owen v. Hatheway*, *Hil. T.* 1827.

2—The Acts of Parliament 5 Geo. II., cap. 19, and 13 Geo. II., cap. 18, relating to the proceedings for *certiorari*, do not extend to this Province. *Ex parte Ritchie*, 2 *Kerr* 75. *Ex parte Bustin*, 2 *All.* 211.

3—The Statute 1 Rich. II., cap. 12, under which a Sheriff was held liable in an action of debt for an escape, is not applicable to this Province. *Wilson v. Jones*, 1 *All.* 658.

4—The Statute 29 Eliz. cap. 4, relating to Sheriff's fees, is not in force in this Province. *Kavanagh v. Phelan*, 1 *Kerr* 472.

5—The Act 2 Geo. II., cap. 23, requiring the delivery of bill of costs a month before action, is not in force here. *See* No. 16.

6—The Statute 33 Hen. VIII., cap. 39, sec. 50, giving to bonds to the King the force and effect of a Statute Staple, extends to this Province. *Rex. v. McLaughlin*, *Mich. T.* 1836.

7———The Statute of Uses 27 Hen. VIII., cap. 10, and the Statute of Enrolments 27 Hen. VIII., cap. 16, extend to and are in force in this Province. *Doe dem Hannington v. McFadden*, Bert. 153.

8———The Statute 33 Hen. VIII., cap. 39, sec. 79, authorizing the Court of Exchequer to give relief to Crown debtors, extends to this Province, and by virtue thereof the Supreme Court may relieve from an estreated recognizance (Parker, J., *dubitante*). *Rex v. Appleby*, Ber. 397.

9———The Act of Parliament 9 and 10 Wm. III., cap. 15, relating to submissions to arbitration, held to be in force. (*See* No. 13.) *Doe dem Allen v. Murray*, 2 Kerr 359.

10———The Statutes 43 Eliz. cap. 6, and 13 Car. II., cap. 2, relating to costs, are in force in this Province. *Kelly v. Jones*, 2 All. 473; *Gilbert v. Sayre*, 2 All. 512.

11———The Statute 43 Eliz. cap. 6, authorizing a Judge to certify to deprive a plaintiff of costs, being part of the practice of the Court of King's Bench when the Supreme Court of this Province was established, is in force here, and is not affected by a subsequent repeal of it in England. *Kelly v. Jones*, 2 All. 473.

12———The Act of Parliament 3 Jac. I, cap. 7, requiring the delivery of an attorney's bill of costs before action brought, extends to this Province. *See* No. 16.

13———The Statute 9 and 10 Wm. III., cap. 15, does not apply to references under the Act of Assembly. *See Brown v. Harding*, 3 All. 351.

14———Certificate under English Bankrupt Act pleadable in this Province.

*See Bankrupt.*

15———*Quære*, Whether the Statute 13 Eliz. cap. 10, applies to Church Corporations in this Province? *See Bedell v. Rector, &c., of Christ Church, Fredericton*, 3 All. 217.

**16—Bill of Costs—Delivery of.**

The Act of Parliament 3 Jac. I, cap. 7, requiring the delivery of an attorney's bill of costs before action brought, extends to this Province, but the Act 2 Geo. II., cap. 23, requiring the delivery a month before action, is not in force here. *James v. McLean*, 3 *All.* 164.

**17**———The construction given in England to the Statutes 22 and 23 Car. II., cap. 9, is part of the law of this Province, and is not affected by the Act of Assembly 13 Vic. cap. 32. *See Costs* 24.

**BY-LAW.**

**Suing for calls—No bye-laws made.**

*See* Joint Stock Company.  
Fredericton, (City of.)

**1—Proof—Necessity of.**

In a prosecution for a penalty under a by-law of a corporation, the by-law must be proved. *Reg. v. Wortman*, 4 *All.* 73.

**2**———In a prosecution tried before the Mayor of Fredericton, for violating a by-law of the Corporation, the by-law must be proved. *Ex parte Mulligan*, 5 *All.* 381.

**3—Not fixing time for payment—Selling without License—Penalty—Right to recover.**

A by-law of Fredericton, to regulate the public market, required the stalls in the market to be leased annually, and declared that the lessee of a stall should receive from the Mayor a license to occupy, and that any person occupying without license should be liable to a penalty. *Held*, In a prosecution for the penalty, that the only question was whether the defendant had a license. *Ex parte Mulligan*, 2 *All.* 583.

Where the by-law fixes no time for payment of the purchase money of a stall, it may be done by conditions of sale. *Ibid.* (*See* Justice of the Peace.)



#### **4—Power to make By-laws — Authority to impose a toll.**

Power given to the Corporation of Fredericton by the Act 22 Vic. cap. 8, to make by-laws "to regulate the anchorage, lading and unlading of vessels," does not authorize the imposition of a toll for anchorage. *Reg. v. Dowling*, 5 All. 378.

#### **5—Corporation limiting by contract—Their power to make by-laws.**

The Corporation of St. John being by charter the conservators of the harbour, with power to regulate the navigation, anchoring and fastening of vessels, and to make by-laws, etc., granted to the plaintiff the right to build a wharf extending into the harbour, and to receive the wharfage and emoluments to be derived from vessels lying at such wharf—the plaintiff built a wharf, and the Corporation afterwards passed a by-law that no vessel should lie at that wharf with her bow to the south; in consequence of which the plaintiff lost the wharfage of a vessel. *Held*, In an action against the Corporation, that they had no right to limit by contract their power to make by-laws relative to matters within their control under the charter, and that the plaintiff's grant must be taken subject to their right to make such by-laws from time to time, as they should deem necessary for the anchorage of vessels. *Walker v. Mayor, &c., of St. John*, 1 Fug. 143.

#### **Power in Corporation St. John to make bye-laws for pilotage since passing of "The British North America Act, 1867."**

*See* The British North America Act, 1867, 5.

#### **6—Licensed tavern—Suffering music to be played in house.**

Where a building, used as a dancing room, was built separate from a house licensed as a tavern, but had communication therewith through a porch, and there was no other entrance to the dancing-room—*Held*, That it was a part of the house, and that the proprietor was liable to a fine under a by-law of the City of St. John, for allowing music to be played therein. *Ex parte Harvey*, 5 All. 264.

**7—License to sell fresh meat—St. John—Freemen.**

By section 8 of the by-law of the City of St. John, passed in July, 1876, it is provided that the Mayor may license freemen, &c., to sell fresh meats, &c., for which license the sum of \$20 shall be paid to the City Chamberlain. The 9th section imposes penalties upon persons other than licensed butchers or persons licensed under the 8th section, who shall sell fresh meats, &c., in small quantities, either in the market or elsewhere in the city. *M.*, a freeman of the city, was convicted of an offence against this by-law. *Held*, That the by-law in question was invalid as against freemen of the city, and that the conviction was bad. *Ex parte Minnehan*, 1 P. & B. 228.

**8—Corporation of St. John—Punishment by imprisonment—Invalidity of by-law.**

By 33 Vic. cap. 4, sec. 3, the Mayor of Saint John is authorized to license persons being natural born British subjects, and also such persons as shall become naturalized or be made denizens, and also aliens, the subjects of any country at peace with Great Britain, to use, &c., any art, trade, &c., or engage in any profession, &c., within the City of St. John, on payment of such sum of money as may be fixed by the Common Council. By the fourth section, the Common Council is empowered to fix the amounts so to be paid, by by-laws ordained for that purpose, and to impose penalties and forfeitures for any breach of the by-laws. By the fifth section, all persons not being free citizens of the city are prohibited from using any art, trade, &c., in the said city, without being duly licensed thereto, as in the said Act provided. In May, 1871, the Common Council passed a by-law, under the authority of the said Act, by which the amounts to be paid for licenses to do business were fixed and determined, and by which it was ordained that any person who should use any art, trade, &c., or engage in any profession, &c., without being duly licensed, should forfeit and pay twenty dollars for each offence. The sum was to be sued for, prosecuted and recovered in the name of the Chamberlain of the city. It was further pro-

vided, that in default of payment of the penalty, the offender was to be committed to the common gaol of the said city for the space of ten days. B. T. was tried before the Police Magistrate of St. John on the charge of practising as a physician without a license, contrary to this by-law. The suit was brought in the name of the Chamberlain. On the trial, the evidence of B. T. was offered and rejected. *Held*, That the by-law was bad, as it authorized the imprisonment of the offender in default of the payment of the penalty, the power to punish breaches of the city by-laws by imprisonment not being given by the charter, nor in express terms by 33 Vic. cap. 47, and the by-law not being in accordance with 6 Vic. cap. 35, sec. 8, which authorizes imprisonment in case no goods or chattels can be found whereon to levy the penalty. A Municipal Corporation cannot enact a by-law subjecting a party to imprisonment, in default of payment of a penalty, without express authority from the Legislature. The proceeding for the recovery of the penalty was in the nature of a civil suit, and not of a criminal proceeding, and the evidence of B. T. was improperly rejected under 19 Vic. cap. 41, (Consol. Stat. cap. 46.) *Ex parte Trask*, 1 P. & B. 277.

#### **CALLS.**

*See* Assessment.

Winding up Act.

**Note may be given for assessment due on calls.**

*See* Bills and Notes II. 9.

**Liability of Equitable and beneficial owner of stock to repay calls.**

*See* Equity. *Botsford v. Crane*.

#### **CANADA.**

**Jurisdiction—Seizure of timber.**

*See* Timber.

#### **CANADIAN COURT.**

*See* Judgment III.

**CAPIAS.**

*See Practice IV.*

**Misnomer.**

*See Identity.*

**Wrong Name—Pleading.**

*See Pleading II. 20.*

It is not an irregularity in a *capias ad respondendum*, that it requires the defendant to answer the plaintiff in a plea of debt, instead of trespass, the usual form. *Campbell v. Mossop, C. Ms. 154.*

**CARLETON WATER WORKS.****Issuing notes.**

*See Mandamus 9.*

**CARRIER.****1—Master of Ship—Loss by Jettison.**

The master of a ship who has signed the usual bill of lading, is not liable for a loss by the jettison of goods, which have been laden on deck with the knowledge and consent of the shipper and consignee. Such master is not estopped by the bill of lading from shewing that the goods are to be laden on deck. *Johnston and another v. Crane, 1 Kerr 356.*

2—The master of a vessel is not liable for the loss occasioned by the jettison of goods, which have been laden on the deck with the privity and assent of the shipper. *Johnston v. Crane, 2 Kerr, 39.*

Under the facts of this case as already reported, *ante*, vol. 1, p. 356, the Court did not think there was sufficient ground for reconsidering their former judgment, though they were not fully agreed on the question, whether the shipper's assent to the goods being taken on deck would under all circumstances be a bar to his recovery for a loss by jettison. *Johnston v. Crane, 2 Kerr 39.*

**3—Loss of lumber—Jus tertii.**

By agreement between the plaintiff and M., the latter

was to furnish plaintiff with supplies to get lumber, which was to be the property of M., and was marked accordingly ; a portion of the lumber was sold, and M. took part of the proceeds—allowing the plaintiff to receive the remainder—and afterwards sued him for the balance of his account for supplies. *Held*, That M. had thereby repudiated all claim to the rest of the lumber, and that in an action against the defendant as carrier for loss of part of it, he could not set up the right of property in M. under the agreement, as an answer to the action. *Forbes v. Holtz*, 4 *All.* 611.

#### **4—Railway Company—Liability.**

The Commissioners of E. and N. American Railway, in the absence of any regulations approved by the Governor in Council limiting their responsibility for the safe conveyance of goods and luggage, are subject to the same liabilities as common carriers. *Willis v. The Commissioners of the European and North American Railway*, 2 *Han.* 157.

#### **5—Delivery to carrier—Acceptance for vendor.**

A delivery of goods by a vendor to a common carrier without any specific direction or authority from the vendee, will not amount to an acceptance by the latter within the Statute of Frauds. *Daley v. Marks*, *Ber.* 346.

#### **6 · Delivery not complete—Loss.**

Plaintiff sent boards alongside of defendant's vessel to be shipped, but before being taken on board, they had to be surveyed and classified by the plaintiff, and before this was done they were stolen. *Held*, That until the survey and classification, they were not in defendant's possession, and he was not liable for their loss. *Cushing v. Roberts*, 5 *All.* 296.

#### **7—Negligence of servants.**

A common carrier is liable for the negligence of his servants in taking goods on board his vessel in his absence, though he may have directed them not to receive goods—the plaintiff having no notice of such instructions. *Street v. Morrison*, 5 *All.* 296.

#### **8—Negligence in using improper gear.**

In putting a large cask of brandy on board a vessel from

a wharf, a carrier used can-hooks. In lowering the cask from the wharf one of the chains (by which the hooks held the cask) broke and the cask fell into the hold and was destroyed. *Held*, That it was negligence to use can-hooks instead of slings to lower the cask. *Street v. Morrison, East. T.* 1862.

### **9—Carriers—Loss of baggage—Damages.**

The plaintiff being a passenger on the defendant's railway, gave his baggage in charge of their servants. The baggage having been lost, the plaintiff sued for the value of articles, and damage sustained in consequence of such loss, both in expense incurred thereby and loss of time. *Held*, that the damage must be confined to reasonable expenses of searching for the baggage, such as telegraphing, cab hire in going to the defendant's office, and such like expenses. *Morrison v. The European & N. A. Ry. Co., 2 Pug.* 295.

**10**———In an action against a common carrier for the loss of goods, a jury is not justified in giving a verdict of greater damages than the value of goods actually proved to have been contained in the case, and the maxim *omnia præsumuntur contra spoliatores* will not apply unless it is shewn that the goods were in the defendant's possession, and that they had an opportunity, but omitted to shew their value. *Smith v. Lunt, 2 Pug.* 64.

### **Action of tort against—Admission by Agent.**

*See Evidence I. 81. Regina v. Peters.*

**CA. SA.**

*See Bail 7, 19. Practice IV.*

## **CASUAL EJECTOR**

### **Judgment against.**

*See Ejectment III.*

*Practice VIII.*

**CAVEAT EMPTOR.**

**Sale and conveyance of land—No Fraud—Eviction of purchaser by title paramount—Action for money had and received for purchase money, not maintainable.**

*See Assumpsit 24.*

**CERTAINTY.**

*See Justice of the Peace. (Conviction.)*

**CERTIFICATE OF JUDGE.**

*See Judge.*

**CERTIFIED COPIES OF DEEDS.**

*See* [Evidence VII.

*Semble*, Whether certified copies of deeds are properly receivable in evidence under Rev. Stat. cap. 112, sec. 12, without a new affidavit and notice since first trial of cause.

*See Gilbert v. Campbell, 2 Han. 55.*

**Certified copy of bill of sale [not receivable on evidence.**

*See Bill of Sale 4.*

**CERTIFIED FEES.**

**Constable—Right to Recover.**

*See Criminal Law IV.*

**CERTIORARI.**

- I. WHEN IT LIES. WHEN GRANTED.
- II. TIME OF APPLICATION. DELAY.
- III. MISCELLANEOUS.

## I.

WHEN IT LIES—WHEN GRANTED.

**1—Proceedings of Trustees of Schools.**

The Supreme Court has power to grant a *certiorari* to remove the proceedings of trustees of schools under the Parish School Act 15 Vic. cap. 40, and to quash them if defective. *Ex parte Jocelyn, 2 All. 687.*

**2—Judgment of City Court.**

A *certiorari* lies to remove a judgment from the City Court of Saint John; and the power will be exercised where the case involves questions as to the right of real property and the construction of Statutes, though the amount in dispute is trifling. *Ex parte McNichol*, 3 *All.* 498.

**2a—Important principle—City Court.**

Where an important principle was involved in a case tried before the City Court of St. John, the Court granted a *certiorari* to bring up the proceedings, though the case might have been reviewed before a Judge at Chambers. *Ex parte Foye, East. T.* 1878.

**3—Proceedings of Justice of Peace.**

*Quære*, Whether a *certiorari* to remove proceedings before a Justice of the Peace in a civil suit, is not taken away by the Rev. Stat. cap. 137. But if not, some reason must be shewn for not proceeding by review. *Ex parte Ellis*, 3 *All.* 601.

**4—Insolvent Debtors Act.**

A *certiorari* lies to remove into Supreme Court the proceedings before Justices under the Insolvent Confined Debtors Act. *White v. Coleman*, 4 *All.* 630.

**5—Insolvent Act of 1869.**

A demand was made upon a debtor under sect. 14 of the Insolvent Act, 1869, requiring him to make an assignment of his estate and effects for the benefit of his creditors. The debtor presented a petition under section 15 to the County Court Judge, upon hearing which he decided that the demand was inoperative, and ordered that no further proceedings be taken. *Held*, That as there was an appeal from the Judge's decision, a *certiorari* would not lie to remove the proceedings. *Ex parte Thomas*, 2 *Han.* 168.

**6—Summary convictions.**

The power given to a Judge by the Rev. Stat. cap. 161, sec. 32, to hear appeals from summary convictions before



Justices of the Peace, does not take away the right of the Supreme Court to grant a *certiorari* to remove such convictions. *Ex parte Montgomery*, 3 *All.* 149.

*Quere*, Whether such mode of appeal is applicable to offences not created by the Rev. Stat. Also, whether, in deciding a case on appeal, the Judge is to be governed by strict legal principles or by the equitable principles on which reviews of civil cases are determined? *Ib.*

#### **7—Commissioners altering road.**

The granting a *certiorari* being discretionary it was refused to bring up the proceedings for the alteration of a public road, where the applicant had allowed one term to elapse, and the road had been opened in the mean time. *Rex v. Heaviside, Hil. T.* 1888.

#### **8—Senate of University.**

A *certiorari* is only granted to bring up the judicial acts of some inferior tribunal. The acts of the Senate of the University of New Brunswick in dismissing one of the professors are not judicial acts, and therefore not subjected to be reviewed by this Court. *Ex parte Jacob*, 5 *All.* 158. *See University of New Brunswick.*

#### **9—Proceedings before Police Magistrate, St. John.**

A conviction before the Police Magistrate of St. John for a breach of the bye-laws of the Corporation cannot be removed by *certiorari*, the provisions of the 36th and 37th sections of the Portland Police Act 11 Vic. cap. 12, by which the *certiorari* is taken away, and an appeal given being incorporated in the St. John Police Act 12 Vic. cap. 18. *Ex parte Harley*, 5 *All.* 264.

#### **10—Assessment—Water Commissioners of St. John.**

*Certiorari* refused to bring up an assessment of the Water Commissioners of St. John under the Act 18 Vic. cap. 38, though the *certiorari* was not taken away by the Act. An appeal to the Common Council being given to persons aggrieved by the assessment. *Ex parte Nowlin, Trin. T.* 1864.

**Assessment—Party not injured by mistake.**

*See Commissioners. Ex parte Calhoun.*

**11—Question of Fact.**

A *certiorari* will not in general be granted, when the case in the Court below depends on a mere question of fact. *Lord v. Turner*, 2 *Han.* 13.

**12—Remedy by Review.**

Where a mode of reviewing the judgment of an inferior Court is pointed out by statute, the Court will not grant a *certiorari* except under exceptional circumstances.

Where a party has elected his mode of appeal by applying for a review, and an adverse decision has been had; the court will not grant a *certiorari*; the party must abide by the decision of the tribunal he has elected. *Ex parte Richards*, 2 *Pug.* 6.

**13**——Where a Judge grants a rule nisi for a *certiorari*, the Court will entertain the motion although the party complaining might have proceeded in a summary way by review. *Ex parte Wilson*, 1 *P. & B.* 274.

II.

TIME OF APPLICATION—DELAY.

**1**——The time for granting a *certiorari* to remove proceedings of Trustees of Schools under Parish School Act 15 *Vict. cap.* 40, is not limited by Act 13 *Vic. cap.* 30, sec. 2. *Ex parte Jocelyn*, 2 *All.* 637.

**2**——An application for a *certiorari* to remove proceedings under the Highway Act 13 *Vic. cap.* 4, though no time is limited by law, should be made without unreasonable delay. A delay of one term held not unreasonable. *Ex parte Herbert*, 3 *All.* 108.

**3**——Where an appeal from a summary conviction is made to a Judge of the Court under the 1 *Rev. Stat. cap.* 161 sec. 32, and refused by him, a subsequent application to this Court for a *certiorari* should in general be made at the first term afterwards. *Ex parte O'Regan*, 3 *All.* 261.

The Court refused to interfere in such a case after the lapse of one term, where the conviction appeared to be sufficient on the merits. *Ibid.*

4———An application for a *certiorari* should be made at the first term after the conviction; but where the Justice had no jurisdiction in the matter, a *certiorari* was granted, though a term had elapsed. *Ex parte Mulhern*, 4 All. 259.

5———An application for a *certiorari* to remove an assessment, should be made promptly. Where a party had notice of an assessment in December, and his property was sold under execution for non-payment early in February, an application made in Easter term for a *certiorari* to remove the proceedings was refused, though the assessment appeared to have been improperly made. *Ex parte Gerow*, 4 All. 269.

6———When an order of affiliation was made in January 1865, but the defendant did not enter into recognizance to support the child, and in January, 1866, the Sessions adjudged him to be imprisoned for not obeying the order. *Held*, Too late to apply for a *certiorari* to remove the proceedings for an alleged defect in the order of affiliation. *Ex parte Kennedy*, Hil. T. 1866.

#### 7—Improper Entry—Delay.

Where a rule *nisi* for a *certiorari* was granted in Easter Term, and the rule improperly entered on the pleas side of the Court, in consequence of which it was discharged in Trinity Term; it is too late to renew the application in Michaelmas Term, and *Quære*, Whether it would have been granted in Trinity Term. *Robins v. Watt*, Mich. T. 1866.

#### 8—When in time.

When an assessment was ordered on the 20th October and a rule *nisi* for a *certiorari* obtained at Chambers on 27th February returnable in Easter, the Court held the application to be in time. *Regina v. The Assessors of Rates*, Kings, 1 Han. 520.

**9—Irregularity—Lateness in application.**

Where the proceedings of Commissioners appointed to lay out a street under the authority of an Act of Assembly, had been filed in a public office, as directed by the Act, in November, 1864, and the parties objecting to the laying out, and whose property had been taken by the Commissioners, applied to the Legislature for compensation in the following year. *Held*, That it was too late afterwards in 1865 to apply for a *certiorari* to bring up the proceedings of the Commissioners on the ground of irregularity. *Reg. v. Flewelling*, 6 *All.* 419.

**10—Refusal to act—Payment of Services.**

It is no objection to the proceedings of the Commissioners that they refused to act until the Corporation of Saint John guaranteed the payment for their services, the street being in the city and the Act under which they proceeded having made no provision for paying them. *Ibid.*

**Delay in applying for—Entry of Clerk of—Notice to appear—Service—Insufficiency of proof of.**

Defendant was summoned to appear before the Sessions of Queen's County, in January, 1872, to answer a complaint of selling liquor without licence. The affidavit of service of the summons was sworn before a Commissioner. Defendant did not appear, and the hearing was postponed from one Session to another until January, 1874, the defendant at no time appearing, when he was convicted of the offence. In the copy of proceedings returned by the clerk, an entry was made that "notice to appear was served on defendant."

*Held*, on application for a *certiorari*, that this was not sufficient, but that the clerk should have entered how the service was proved, and when and how it was made. Also, that a Commissioner had no power to take the affidavit which should have been made in open court.

Where a conviction was made on the 20th January, and the copy of proceedings delivered to defendant on February 8th, but only reached his counsel on February 10th,

and was forwarded to Fredericton for the purpose of moving for a rule *nisi* in Hilary Term, but was accidentally mislaid. The court held that under the peculiar circumstances of the case, a rule *nisi* was properly granted though defendant did not apply until Easter Term. *Regina v. Golding*, 2 *Pug.* 385.

### III.

#### MISCELLANEOUS.

##### **1—Bond before appeal—Certiorari not taken away by Act of Assembly.**

The Act 18 Vic. cap. 36, to prevent the traffic in intoxicating liquors, authorized a Justice of the Peace to impose fines and to order liquors to be destroyed in certain cases; and the 17th section declared that no order of the Supreme Court, or any other Court for review or removal, or other appeal from the judgment of the Justice, should be allowed, unless the appellant should give notice to the Justice of his intention to appeal, and within ten days after the conviction execute a bond with sureties to prosecute the appeal with effect, and to pay the fine and costs imposed upon him, in case the conviction was affirmed. *Held*, That the *certiorari* not being taken away by the Act, it was not necessary to give a bond to prosecute as a preliminary proceeding to applying for a *certiorari* to remove a conviction under the Act. *Ex parte Cliff*, *Mich. T.* 1856.

##### **2—Allowing return to be amended—Ordering further Certiorari.**

A *certiorari* having issued to bring up the proceedings and order made in the case of an insolvent confined debtor, the Justices stated in the return that the order was not in their possession, the return was allowed to be amended, by the Justices stating the substance of the order, if in their power to do so, or if not, by stating how the original order went out of their possession, or what has become of it, or otherwise, that a further *certiorari* might issue. *Reg. v. Vail*, 5 *All.* 165.

**3—Costs—Conviction.**

When a rule *nisi* for a *certiorari* to remove a conviction is discharged, the successful party is not entitled to the costs of opposing the rule. *Ex parte Daly*, 1 *All.* 485.

**4—Judge in vacation.**

A Judge of Supreme Court may grant a rule *nisi* for a *certiorari* returnable in Term. *Ex parte McNeill*, 8 *All.* 498.

**5—Special provision in Act.**

A Judge in vacation has no authority to make an order to shew cause in Term why a *certiorari* should not issue to remove proceedings under the Act 13 Vic. cap. 58. *Ex parte Irvine*, 2 *All.* 516.

**6—Short service—Enlarging rule.**

Where an order *nisi* for a *certiorari* had been served only four days before the first day of the term at which it was returnable, the Court refused to make the rule absolute, and enlarged it till the next term. *Ex parte Lyons*, 6 *All.* 409.

**7—Security for costs—School Act—Provisions of other Act—Application of.**

The provisions in the School Act 21 Vic. cap. 9, sec. 16, that the proceedings for levying and collecting assessments shall be the same as provided for County and Parish rates, applies to the mode, machinery and forms by which these rates are levied and collected, and does not require security to be given for costs before a *certiorari* is granted to remove the assessment, nor give an appeal to the Sessions, as provided in the case of County rates by the Rev. Stat. cap. 58, secs. 6, 22. *Reg. v. Jardine*, 5 *All.* 645.

8— — The provisions of 1 Rev. Stat. cap. 58, sec. 6, requiring security for costs before granting a *certiorari* to remove a rate is not incorporated in the Parish School Act. *Reg. v. Assessors of Rates, King's County*, 1 *Han.* 520.

**9—Return not under seal—Objection.**

A party appearing to support a conviction cannot object to the cause being proceeded with, because the Justice's return so the *certiorari* is not under seal. *Regina v. Oulton*, 1 *All.* 269.

**10—Application to Judge at Chambers—Practice.**

On an application to a Judge at Chambers for a *certiorari*, there should be a summons or rule *nisi* in the first instance. *Ex parte Howell*, 1 *All.* 584.

**11—Contradictory affidavits.**

Where the affidavits in answer to an application for a *certiorari* to remove the proceedings in a prosecution under the Act 5 Wm. IV. cap. 2, for non-performance of statute labour, stated that the party had been *duty notified*; the Court made the rule absolute in order to ascertain what the notice was—the applicant in his affidavit having denied notice. *Ex parte Ferguson*, 1 *All.* 663.

**12—Return from justice.**

A return from Justice should be before the Court. *See Lord v. Turner*, 2 *Han.* 13.

**13—Renewal of application.**

When a rule for a *certiorari* is discharged because the affidavits are improperly entitled, the application may be renewed on amended affidavits. *Ex parte Bustin*, 2 *All.* 211.

**14—Refusal.**

An application for *certiorari* was refused where three former applications had failed, twice in consequence of a defect in the jurat of the affidavit, and once in consequence of the rule having been improperly granted by a Judge at Chambers. *Ex parte Irvine*, 2 *All.* 519.

**15—Copies of proceedings—Return.**

It is the duty of School Trustees to keep a minute of their proceedings, and if the original orders have been filed with the Clerk of the Peace or Assessors, copies may be returned with the *certiorari*. *Ex parte Jocelyn*, 2 *All.* 637.

**16—Mistake in name of applicant—Quashing—Ordering new certiorari.**

Where the Christian name of the Applicant for a *certiorari* was misstated in the writ, it was quashed, and a new *certiorari* ordered to issue. *Reg. v. Watters*, 6 *All.* 409.

**17—Affidavits—When may be used.**

After the return of a *certiorari*, affidavits may be used to shew want of jurisdiction in the Justice, when that fact does not appear on the return. *Reg. v. Simmons*, 1 *Pug.* 158.

**18—Returnable when—Practice.**

By the practise of the Court a *certiorari* is returnable (unless otherwise ordered) at the term next after that in which the rule for it is granted; and if not issued and served before such term, it is too late. *Reg. v. Harshman*, *Mich. T.* 1872.

**19—Contradicting return—Use of Affidavits.**

The affidavits on which a *certiorari* was obtained cannot be referred to, for the purpose of contradicting the return. *Ibid.* (See Allen's Notes to *The King v. Justices of York*, *C. Ms.* 110.)

**Statute 13, Geo. II. cap. 18, not in force.**

*See British Statutes.*

**Removal of cause.**

*See Attorney-General.*

**Election of Rectors.**

Whether *certiorari* will lie to remove proceedings in election of. *Ex parte Beek*, 2 *Pug.* 66.

**CESTUI QUE TRUST.****Relation of trustee and Cestui que trust Created.**

*See Equity* 2 a.

**CHALLENGE.**

*See Jury.*

**To fight a Duel.**

Whether a letter be a challenge to fight a duel or not, left as question for the jury. It is no objection that the question has been left to them when their finding accords with the Judge's own opinion. *Dolby v. Kinnear*, 1 *Kerr*, 480.



**CHAMBER PRACTICE.**

**Attendance of competent agent—Taking out summons  
—One sufficient for attendance.**

*See General Rules 9, 63.*

**CHATTEL.**

**Unregistered ship — Transfer — Revesting property—  
Evidence.**

*See Shipping Law 6.*

**Trees severed from land.**

*See Assumpsit 49.*

**Manure, a chattel.**

*See Trover 15, 16.*

**Building placed on land.**

*See Fixture.*

**CHECK.**

**1**———An unstamped check drawn upon a person, not being a chartered or licensed banker, or the manager of a savings bank, is void under the Canadian Statute 31 Vic. cap. 9, and cannot be received as evidence of payment. *Gandy v. Staples*, 1 *Han.* 615.

**2—Initialing of by cashier—Acceptance—Set-off.**

In an action on a bill of exchange, the defendant claimed to set-off the amount of a check payable to "bearer," drawn by one L. upon the plaintiffs, several years previously, upon which their cashier had written the initials of his name. In 1867, L. gave the check so initialed to G., who kept it till a few days before the trial of this cause (1871,) and then gave it to the defendant. *Held*, 1st. That if the check could be treated as an inland bill of exchange, the initialing of it did not operate as an acceptance within the statute. 2nd. That even if the initialing of the check could operate as an agreement by the plaintiffs to pay the amount o L., it was only a chose in action which the defendant could not avail himself of in this suit. *Commercial Bank v. Fleming*, 1 *Pug.* 86.

**CHILD.**

*See* Illegitimate Child.

**CHOSE IN ACTION.****Recognition of assignment.**

B. agreed, by a note in writing, to pay A. £20 in lumber, by a certain day, before which time A. assigned the contract to C. *Held*, That B. was not bound to recognize the assignment, but might deliver the timber to A., which would be a good discharge. *See Green v. Williston*, 8 Kerr 58.

**Check operating as an agreement by plaintiff to pay amount.**

*See* Check 2.

**CHURCH OF ENGLAND.****1—Land granted as a Glebe—Trespass—Right of Rector.**

Where land is granted to the Rector, Church Wardens and Vestry of a Parish, incorporated under the Act. 29 Geo. III, cap. 1, as a glebe for the use of the Rector, and he has been inducted and taken possession, an action of trespass for entering on the land and cutting down trees, must be brought in the name of the Rector. *Rector &c. of St. Stephen v. Tortelot*, 1 Kerr 537.

**2—Style—No Rector appointed—Grant.**

A Church Corporation may exist under the Act. 29 Geo. III, cap. 1, by the style of "the Rector, Church Wardens and Vestry of &c.," though no Rector has at the time been appointed, and a grant to the Corporation by that name is good. *Doe dem Rector &c. of Queensbury v. Guion*, 1 All. 6.

**3—Powers of Church Wardens and Vestry.**

The Church Wardens and Vestry may exercise the powers given to the Rector, Church Wardens and Vestry by the Act 29 Geo. III, cap. 1, as well where there never has been a Rector appointed, as where a vacancy is created by the death or absence of the Rector. *Ibid.*

**4—Grant—Intention.**

A grant of land to the Rector, Church Wardens and Vestry of a Parish "for a glebe," sufficiently indicates that it is intended to be for the use and benefit of the Rector under the Act 56 Geo. III, cap. 11. *Rector, &c. of Hampton v. Titus*, 1 All. 278.

**5—Rector—Incumbency—Legal Estate.**

Under the provisions of the Act. 56 Geo. III, cap. 11, the Rector of a Parish has, during his incumbency, a legal estate of freehold in glebe lands granted to the Church Corporation, and may make leases thereof, binding upon himself, without the assent of the Corporation. (Street J., *dissentiente*.) *Ibid*.

**6—Lease by Rector.**

*Quære*, Whether a lease of glebe lands by the Rector and Church Corporation for a term not exceeding 21 years would be binding on a succeeding Rector? *Held*, Per Street J., that it would. *Semble*, Per Carter J., that the lease should be confirmed by the Ordinary. *Ibid*.

**7—Property in Trees—Trover.**

The property in the trees growing on glebe lands is in the Church Corporation as the owners of the inheritance, and they may maintain trover for them, if wrongfully severed, against a tenant of the Rector, or any person acting under the tenant's authority. *Ibid*.

**8—Statute.**

*Quære*, Whether the Statute 13 Eliz. cap. 10, relating to leases by ecclesiastical persons, applies to Church Corporations in this Province. *Bedell v. The Rector, &c. of Fredericton*, 8 All. 217.

**9—No Rector—Action in name of Church Corporation**

An action for trespass for injury to a Parish Church may be brought in the name of the Church Corporation in the absence of evidence of there being a legally inducted Rector. *Rector, &c. of St. George's Church v. Cougle*, 1 Han. 609.

**10—Closing Church—Unlawful act.**

In an action of trespass for boarding up the doors and windows of a church, the defendants justified as Church Wardens, and that they had closed the church for repairs; but it was proved that they closed it to prevent a clergyman, who claimed to be Rector, from officiating there. *Held*, That even if the defendants were Church Wardens and there was no Rector, they had no right to close the church against other members of the corporation, or to prevent public worship being held there. *Ibid*.

**11—Vacant Rectory—Right of presentation.**

Prior to the Act 32 Vic. cap. 6, the Lieut.-Governor of the Province had, by virtue of the Queen's prerogative, and the laws of the Church of England in this Province, the right to collate and to present to a vacant rectory. *Doe dem. Rector of St. George's Church v. Cougle*, 2 Han. 96.

**12—Rector—Rents of Glebe—Liability to assessment.**

Under the Act 26 Vic. cap. 35, which exempts from taxation the income of the inhabitants of Fredericton derived from real or personal property, the Rector of the Parish is not liable to be assessed upon the income derived from the rents of his glebe. *Lee v. Mayor of Fredericton*, East. T. 1873.

**13—Induction—Leave to file Information.**

Where a priest of the Church of England, in holy orders, has been nominated under the Act. 32 Vic. cap. 6, to fill the office of Rector of a Parish, and has been duly presented to the Bishop and instituted, and a mandate has issued to induct him, and he has actually entered on the duties of Rector of such Parish, he is the legal Rector, though he may not have been inducted, and is entitled by law to preside at the meeting for election of Church Wardens and Vestrymen. *Chandler ex parte, Re Taylor and others*, 1 Pug. 354.

Leave to file information in nature of a *quo warranto*,

calling on certain persons to shew cause why they respectively claim to exercise the officers of Church Wardens and Vestrymen, granted. *Ib.*

#### **Election of Rector.**

*See Election. Ex parte Beek.*

#### **CHURCH CORPORATION.**

*See Church of England.*

#### **CHURCH WARDENS.**

*See Church of England.*

#### **CITY COURT.**

##### **Practice in judgment by default.**

A practice in the City Court of St. John of awarding to the plaintiff on judgment by default, the amount claimed in his particulars of demand filed at that time, without any proof of the amount, or any copy of the particulars served on the defendant, is bad, and cannot be rendered valid by the length of time the City Court has been in existence; neither is this practice confirmed by the Act 5 Wm. IV, cap. 45, sec. 7, never having been allowed by any superior legal tribunal before the passing of the Act. *Allen v. Mackay*, 1 All. 365.

##### **Jurisdiction—Residence of parties outside the city.**

The City Court of St. John has jurisdiction in suits for the recovery of sums under £5, though the defendant may not reside in the city, but has been served with process there. *Ex parte Ingraham*, 2 Pug. 306.

#### **CITY COUNCILLOR.**

##### **Election—Disqualification.**

A contractor with the Commissioners of the Alms House for the County of York, is disqualified from being elected a City Councillor in Fredericton, under the Act 22 Vic. cap. 8. *Ex parte Cameron* 1 Han. 306.

#### **CITY OF FREDERICTON.**

*See Fredericton (City of.)*

**COGNOVIT.**

*See* Warrant of Attorney.

**1—Costs—Estoppel.**

Where a defendant has given a confession of judgment for £50, he is estopped from requiring that summary costs should be taxed, although the sum really due and for which execution is to issue, be under £20. *Foster v. Brown*, 1 *Kerr* 200.

**2—Conditions—Liberty to enter up judgment.**

By the terms of a cognovit it was agreed that in default of payment of a certain sum on a particular day, with costs to be taxed, the plaintiff should be at liberty to enter up judgment and sue out execution for such sum and costs. *Held*, That there was no forfeiture of the cognovit until the costs were taxed, and the amount made known to the defendant. *Snodgrass v. Wilson*, 1 *All.* 373.

**3—Waiver.**

A cognovit may be given before declaration filed, and is a waiver of any irregularity in the previous proceedings. *McNamee v. O'Brien*, 4 *All.* 548.

**Motion to set aside—Dismissal—Costs.**

*See* Costs 85.

**Costs.**

*See* Costs 19.

**COLLECTOR OF CUSTOMS.****Liability for accidental fire destroying goods detained after request.**

*See* Action on the Case I. 1.

**COMMISSIONER.****Of Highways.**

*See* Justice of the Peace (Summary Conviction.)

*See* Action at Law (Notice) XI. 13, 14.

Highways.

Trespass V. 6.

**Of Insolvency—Affinity—Disqualification.**

A commissioner appointed to examine confined debtors,

was held disqualified from holding an examination in a case in which the plaintiff was a first cousin to his wife. *Peck v. Barbarie*, 1 *Han.* 523.

**Commissioners of European and North American  
Railway—Duty of—Damage to land—Prevention  
of—Right of Action against.**

*See Damages* 30.

**1—Of Sewers.**

The acts of Commissioners of Sewers appointed under the Act 22 Vic. cap. 53, are not judicial acts, therefore they are not disqualified from assessing the proprietors of land for the purposes of the Act, by reason of their being interested as owners of land in the district assessed. (Ritchie, J., *dissentiente.*) *Ex parte Calhoun*, 5 *All.* 454.

2———An owner of land in Germantown Lake District is disqualified from acting as a Commissioner of Sewers for that district, the duties of such Commissioners under the Act 22 Vic. cap. 53, being of a judicial character—per Ritchie, C. J., and Weldon, J. Per Allen, J., That the Court was bound by the decision in *ex parte Calhoun* that the Commissioners were not disqualified by reason of their interest. (But see Act 32 Vic. cap. 73.) *Reg. v. Commissioners of Germantown Lake*, 1 *Han.* 343.

3———A Commissioner of Sewers who is interested in a contract for the performance of work done under the Commissioners, is disqualified from acting with the other Commissioners in the approval of the work: and if he does so, an assessment on the proprietors of land, in which an amount for payment of such work is included, is bad. *Ibid.*

4———The intention of the Act 32 Vic. cap. 73, being to remove the disqualification of Commissioners of Sewers, by reason of their being interested in the lands in the District to be assessed; it necessarily includes the interest of a Commissioner arising from relationship to a proprietor of such lands. *Ex parte Peck*, *Hil. T.* 1871.

**5—Swearing in of—Assessment without—Effect.**

By 1 Rev. Stat. cap. 17, Commissioners of Sewers shall be sworn into office within one week after their election, or shall be deemed to have refused. *Held*, That the Act was imperative, and that a Commissioner elected on the 2nd August could not be legally sworn in on the 8th September—the office at that time being vacant; and that his joining with the other Commissioners in making an assessment, rendered it void. *Reg. v. Commissioners of Hopewell*, 1 *Pug.* 161.

6———*Semble*,—That if an objection is made to a proposed assessment by the Commissioners of Sewers, and some of the proprietors of lands in the District give an undertaking to the Commissioners to indemnify them against all damages and costs in case they make the assessment, and they afterwards proceed with it, the assessment will be set aside. *Ibid.*

**7—Commissioners of Sewers—Appointment—Power of Court to Assent—Interest—Disqualification—Assessment—Mistake—Judicial Acts.**

1———The Act 22 Vic. cap. 53, authorized the Governor in Council to appoint Commissioners of Sewers for the Germantown Lake District, in the County of Albert; and gave power to the Commissioners to cut a canal to drain the lake and adjoining lands, to agree with the owners of any lands taken for the purpose, as to the damages, and to tax and assess the owners of lands in the district, to defray the expense of draining, dyking, &c. Under this Act, Commissioners were appointed, who owned lands within the district to be drained. *Held*, (Bitchie, J., dissenting). 1. That even if the Commissioners from interest, as owners of land in the district, were disqualified from performing some of the duties of the office, they would be qualified to perform other duties; and the Court had no power to annul their appointment. 2. That the making drains and dykes, apportioning assessments to pay the expenses, and agreeing with the owners of land as to damages, were not judicial acts. 3. That if the interest of the



Commissioners was a disqualification for the performance of any particular act, the proceedings arising from that act might be set aside. 4. That under the power given to the Commissioners by the Act, and by 1 Rev. Stat. cap. 67, and 38 Vic. cap. 14, they might assess to defray the expenses of purchasing a mill; erecting a dam across a river; making surveys, and for interest on money borrowed by them (these being necessary for carrying out the objects of the Act), and for their own fees. *Ex parte Calhoun*, 5 *All.* 454.

2———The restrictions sections 5 and 10, of 1 Rev. Stat. cap. 67, as to the notice of executing works, and obtaining the consent of the proprietors of land therefor, do not apply to Commissioners appointed under the Act 22 Vic. cap. 53, but only to those who derive their authority solely from the Rev. Statutes. *Ibid.*

3———A was assessed as a proprietor of land in the Lake district, but it afterwards appearing that he had previously conveyed his land to B., the Commissioners struck A.'s name out of the assessment, and substituted B.'s. A *certiorari* to bring up the assessment on this ground at the instance of A. was refused, it not appearing that he had been injured by the mistake, or that the Commissioners intended to enforce the assessment against him. A *certiorari* was also refused on the application of B.—as the alteration deprived him of no right which he was entitled to—his land being justly liable to the rate. The assessment of other proprietors of land in the district not being increased or altered by the substitution of B.'s name in the place of A.'s, that is no ground for interfering with the assessment on the application of such other proprietors. *Ibid.*

**Acting in capacity of—Making assessment.**

*See Will. Knapp v. King.*

**Commissioner to take affidavits in Supreme Court—  
Authority to administer oaths.**

*See Criminal Law II. 21.*

**Commissioners of Water Company—Owner of land—  
Compensation—Assessment of Damages—Pro-  
ceedings—Construction of Act 2 Wm. IV., cap.  
26—Application for Mandamus—Failure—Re-  
newal of Motion.;**

*See Mandamus 11.*

**COMMISSION MERCHANT.**

*See Warranty 5.*

**COMMITMENT.**

*See Justice of the Peace.*

**COMMON CARRIER.**

*See Carrier.*

**COMMON COUNTS.**

*See Assumpsit.*

**Recovery under.**

*See Assumpsit.*

**Counsel not claiming under common count in open-  
ing case—Right to recover under particulars.**

*See Trial Carrick v. Atkinson.*

**COMMON SCHOOL ACT, 1871.**

**Trustees—Duty—Inspectors' authority.**

If a requisition is made to the Trustees of Schools by a majority of the ratepayers of a district, to call a special meeting for a purpose authorized by "The Common School Act, 1861," it is their duty to call the meeting under the 28 sec. of the Act; and if they refuse, the Inspector is authorized to appoint new Trustees, under the 37th sec. of the Act. *Ex parte Gilbert*, 1 *Pug.* 231.

**Inspector—Appointing trustees.**

The Inspector of Schools is authorized on a proper requisition made under the 37th sec. of "The Common

School Act, 1871," to appoint a new Trustee, either where a Trustee elected declines to accept the office, or, where after the acceptance of it, he declines to do his duty. *Ex parte Kilby*, 1 *Pug.* 219.

#### **Constitutionality—Non-sectarian.**

The Parish School Act, (21 Vic. cap. 9,) conferred no legal right upon any class of persons, with respect to denominational schools; therefore, "The Common School Act, 1871," which declares, that the schools conducted under its provisions shall be non-sectarian, is not *ultra vires*, as being contrary to "The British North America Act, 1867," sec. 93. *Ex parte Renaud*, 1 *Pug.* 273.

#### **Regulations—Effect of.**

The constitutionality of "The Common School Act, 1871," cannot be affected by any Regulations of the Board of Education, made under its authority; and, *Semble*, If the Board of Education have made regulations which they ought not to have made, or have not made regulations which they should have made—it is a case within sub-sec. 4 of "The British North America Act, 1867," sec. 93. *Ibid.*

#### **Appeal to Inspector.**

*See* Appeal 15.

#### **Assessment for school purposes.**

*See* Assessment II.

#### **COMPARISON OF HANDWRITING.**

- " Evidence XI. 16.
- Practice in Equity.

#### **COMPETENCY.**

- " Witness.

#### **COMPOSITION—AGREEMENT.**

- " Bills and Notes V. 9.

#### **COMPOSITION DEED.**

- " Deed.
- Insolvent Debtor.

**COMPROMISE.**

**Of suit by attorney.**

*See Attorney V. 7.*

**COMPULSORY LIQUIDATION.**

**Petition—Hearing of before Judge of County Court.**

*See Insolvent Act of 1879.*

**CONDITION.**

*See Covenant 8.*

Deed I. 25.

Pleading.

Crown Grant II. 1.

Insurance.

**CONDITION PRECEDENT.**

*See Vendor and Purchaser.*

“ Landlord and Tenant.

**1—Loss payable after proof.**

The following clause in a marine policy of assurance, viz: “and in case of loss. such loss to be paid in sixty days after proof of loss and adjustment, and proof of interest in the said assured,” has the operation of a condition precedent; and the judgment was arrested in an action by the assured against the insurer for the want of any averment in the declaration, that such preliminary proof had been furnished to or dispensed with by the defendant. *Watson v. Summers*, 2 *Kerr* 101.

**Arbitration before Action.**

*See Action at Law II.*

**2—Tender of Deed.**

The defendant gave a bond to the plaintiff for the price of land, conditioned to pay £50 on the 1st June, 1849, and the remainder in three annual instalments! and on making the first payment and receiving a deed from the plaintiff, to give a mortgage for the balance. *Held*, That a

tender of a deed was not a condition precedent to the right to recover the first instalment. *Dykeman v. Craig*, 2 *All.* 265.

3—Where A. agreed to sell B. a piece of land, and B. agreed to pay £100 for the same on or before 1st May, on payment whereof A. agreed to give B. a deed free from all incumbrances. *Held*, That A. was entitled to recover against B. for non-payment of the money, without proof of tender of the deed on or before the 1st May. *Hanford v. Gidney*, 1 *Kerr* 82.

#### 4—Payment of costs -Insolvent Debtor.

Payment of costs on failure of a previous application, not made a condition precedent to a second application. *See McFarlane v. Gordon*, 2 *All.* 201.

#### Contract—Driving logs—Performance.

*See* Pleading I. 23.

#### Award—Concurrent Acts.

*See* Arbitration V. 10.

#### Cognovit—Taxing Costs—Forfeiture.

*See* Cognovit.

### CONDITION IN RESTRAINT OF MARRIAGE.

*See* Will 8.

### CONFESSION.

“ Cognovit.

Criminal Law.

### CONFUSION OF GOODS.

“ Trover 26. Replevin 20.

### CONSENT RULE.

“ Ejectment VII.

### CONSIDERATION.

“ Assignment.

Assumpsit.

Bills and Notes.

Contract.

Declaration.  
Deed.  
Fraudulent Conveyance.  
Guarantee.  
Insurance.  
Pleading.  
Usury.

**1—Executory promise—Compensation for injury.**

An agreement, whereby B. who had permission to cut down a certain quantity of pine timber on public land belonging to the Crown, assigns his right and interest to A. by way of compensation for an injury he had done to A., being entered into without the privity or assent of the Crown is illegal and void, and no action can be maintained by A. against B. for continuing to cut timber on such land contrary to his promise contained in such agreement. The assignment being void, the promise was no more than an executory accord, for the breach of which no action lies. *Sharp v. McKeen*, 2 Kerr 524.

**2—Forbearance.**

On motion in arrest of judgment. *Held*, That the agreeing to forbear sending a substitute to exercise the plaintiff's rights in a schooner, of which he and defendant and others were possessed as part owners, is a good consideration to support a promise by the defendant to pay the plaintiff his proportion of the profits. *Murray v. See-lye*, 3 Kerr 312.

**3—Value—Equality.**

In order to constitute a valuable consideration to support a conveyance, it is not necessary that the money paid should be of equal value with the property conveyed ; provided the transaction is *bona fide*. *Payson v. Good*, 3 Kerr 272.

**4—Mutuality—want of.**

A. by deed poll agreed to make and haul all the timber he could find on B's permit, for which B. was to allow him

whatever the timber sold for, after deducting B's supply bill and expenses, and that all the timber got should be the property of B. *Held*, That there was no mutuality, and that B. acquired no property in the timber without a delivery. *Coombes v. Hatheway*, 3 *Kerr* 592.

**5—Illegal contract—Subsequent repeal of Statute.**

A sale of liquor (not by a licensed manufacturer or agent) being illegal by the Act 15 Vic. cap. 51, is not made good by a subsequent repeal of the Act. *Dever v. Corcoran*, 3 *All.* 388.

The original contract being illegal, a promise to pay, made after the repeal of the Act, is void for want of a consideration. *Ibid.*

*Quære*, If the liquor had been in the defendant's possession at the time of the subsequent promise, whether the plaintiff could have recovered? *Ibid.*

**6—Valuable consideration—Deed.**

To constitute a valuable consideration to support a deed, it is not necessary that it should be a money consideration: becoming bail for the grantor is sufficient. *Crockford v. Equitable Insurance Company*, 5 *All.* 651.

**7—Lien—Parting with.**

Parting with property on which the plaintiff has a lien, may be a good consideration to support an express promise, but not an implied one. *See Hartley v. Fisher*, 1 *All.* 439.

**8—Evidence—Explanatory of Consideration—Admission of—Contribution.**

The plaintiff having purchased land from D. in May, 1845, took a deed thereof to himself, and gave a mortgage thereon for the purchase money, as was stated by D. at the trial, and also the joint and several promissory notes of himself and the defendant, no stipulation having been made with D. for the security of the defendant. After the purchase, the defendant claimed and exercised a part-ownership on the land. Afterwards, in March, 1846, the plaintiff gave a conveyance of an undivided moiety of

the land to the defendant, expressed to be "in consideration of £150 to the plaintiff in hand well and truly paid, the receipt whereof was thereby acknowledged." The subscribing witness was admitted to state that no money was paid at the time of the execution of the deed from the plaintiff to the defendant, but nothing whatever was then said about the purchase from DeVeber, or the defendant's joint liability on the notes. The plaintiff having afterwards paid the amount of one of the notes to D., brought an action for contribution on the ground that the purchase was made from D. for the joint interest of plaintiff and defendant, and the defendant was a principal and not a surety on the note. *Held*, (Parker, J., *dissentiente*,) That he was entitled to recover, and that it might be inferred from the circumstances that the original purchase was on joint account; and that the plaintiff's acknowledgment of payment for the moiety in the deed might be explained by circumstances tending to shew that the condition was made up of the defendant's outstanding liability on the note, so as to leave it a question for the jury to say whether the consideration was so satisfied. *Read v. McClellan*, 1 *All.* 81.

**3—Sheriff's sale of goods—Agreement as to bidding—Recovery of difference on re-sale.**

Defendant being an execution creditor of the plaintiff, agreed with him that two persons named, were to bid in certain articles at the sheriff's sale, and if they were not bid up to near their value, that these persons and the plaintiff were to sell them within a certain time, and the plaintiff was to have the benefit of any advance in the price over the sheriff's sale. The goods were bid in, and sales of them afterwards made under the agreement at an advance. *Held*, That there was a sufficient consideration for the agreement and that the plaintiff could recover the difference on the re-sale. *Fraser v. Desbrisay*, 6 *All.* 436.

A promise by an execution creditor who has purchased part of the debtor's property at sheriff's sale to allow the debtor an additional sum beyond what he had bid for the property is *nudum pactum*. *Ib.*



**Retaking possession after service of writ of possession.**

*See* Ejectment V.

**Process of contempt—Court for trial of Matrimonial causes.**

*See* Court for trial of matrimonial causes.

**Continuing Security.**

*See* Warrant of Attorney.

### **CONTINUANCES.**

**Amending Roll by Entry of.**

*See* Amendment III.

After interlocutory judgment continuances may be entered at any time before final judgment. *McDonald v. Upton*, 3 Kerr 565.

**Of Writ.**

*See* Practice IV. 12.

### **CONTRACT.**

*See* Agreement.

**Parties disabling themselves from performing—Recovery on common counts.**

*See* Assumpsit 52.

**Immediate right of action attaching.**

*See* Action at Law IV.

**Rescinding of—Can only be rescinded by the consent of all the parties contracting.**

*See* Action at Law IX. 15.

**Acquiescence — Deviation — Recovery on common counts.**

*See* Assumpsit 42.

**Fixtures—Effect of contract as to gas fittings.**

*See* Fixtures.

**Contract under seal—Partnership—Property—Liability of firm.**

*See* Partnership 5.

**Contract with society supposed to be incorporated.**

*See Equity 5.*

**Corporation — Entering into contract under seal—  
Estoppel.**

*See Corporation 12.*

**1—Sale—Vesting of property—Sufficient delivery.**

Defendant agreed to purchase from plaintiff for \$800 the machinery of a mill, which was partly covered with sand, and paid him earnest money to bind the bargain. About ten days afterwards, the plaintiff signed a writing by which he guaranteed that certain of the machinery (specified) was under the surface of the ground where the mill had stood, and agreed to deliver all the machinery belonging to the mill for \$800, and acknowledged the receipt of \$2 on account of the sale. He afterwards made a formal delivery of part of the machinery in the name of the whole, but the defendant refused to take it unless it was put on the surface of the ground. *Held*, That the title to the machinery vested in the defendant by the verbal agreement when the earnest money was paid, no act remaining to be done but that if by the writing any delivery was necessary, the plaintiff had made a sufficient delivery, and was not bound to put the machinery on the surface of the ground. *Allingham v. O'Mahoney*, 1 *Pug.* 326.

**2—Construction of—Usage—Evidence.**

Defendant having agreed to sell timber to the plaintiffs, made out and delivered to them an account, charging them with the timber, "to be delivered by J. A.," and crediting them with a promissory note for the price. J. A. had no timber belonging to the defendant, but he accepted an order drawn by him for the delivery of the timber to the plaintiffs, on the defendant's promise that it should be in his (J. A.'s) hands at the time the plaintiffs required it. In an action against the defendant for not delivering the timber, (J. A. never having received it,) the defendant gave evidence of a general usage in the timber trade by which the acceptors of such orders were alone responsible to the

purchasers ; and the plaintiffs gave evidence denying such usage. *Held*, 1st. That the defendant was liable to the plaintiffs on his contract for not delivering the timber, and that the jury were properly directed that there was no such proof of usage as would discharge him from his liability. 2nd. That the acceptance was only a prospective delivery order, designating the medium through which the timber was to be delivered, and that unless J. A. received it for delivery to the plaintiffs, they could not maintain any action against him on his acceptance. 3rd. That the contract was contained in the account signed by the defendant, and no time for the delivery being therein specified, it was properly declared on as a contract to deliver in a reasonable time. *Rankin v. Godard*, 4 All. 155.

Plaintiffs in their *prima facie* case having proved only the contract to sell and the breach. *Held*, That they could give evidence to rebut the usage set up by the defendant. *Ibid*.

### **3—Custom not affecting contract—Scowage—Loading ship.**

Where a contract was made to load a ship for \$1.60 per standard by the lump, and part of the load was brought alongside in wood-boats, the contract was held not affected by a custom of the port of Saint John, that in such case the amount of the scowage went to the shipper. *McNichol v. Peck*, 1 Ha. 428.

### **4—Property, in whom belonging—Debiting in Books.**

S., who was building a ship for plaintiffs, being indebted to them, agreed to transfer the vessel to H., one of the plaintiffs, together with all the materials for construction, then procured S. to finish the vessel at his own cost, and rig and equip her with rigging to be provided by plaintiff. The vessel, when finished, to be registered in the name of H. Canvas, cordage and wire were procured by L., at plaintiffs' store ; and while being prepared for the vessel where taken by the Sheriff under an execution against S., when \$150 worth of labour had been expended upon them.

*Held*, That under the agreement the property in the sails and rigging remained in plaintiffs, and that the fact of the articles being charged to S. in plaintiffs' books, was not conclusive to show a sale to S., but was a question for the jury. That the plaintiff was entitled to recover the value of the sails and rigging when taken. *Rankin et al v. Mitchell*, 1 *Han.* 495.

**5—Guarantee—Considered as absolute contract.**

The defendants entered into a written contract with T., by which he was to deliver them a quantity of lumber at a certain time. They afterwards agreed with the plaintiff to transfer to her the balance of lumber coming from T., for which they acknowledged to have received payment in full from the plaintiff, and guaranteed to see the lumber delivered at the time specified in the agreement with T. *Held*, That this was an absolute contract by the defendants to deliver the lumber; and not a guarantee that T. should deliver it, and that the plaintiff had nothing to do with T.'s contract except to ascertain the time of delivery. *Lindsay v. Rose*, 3 *Kerr* 576.

**6—Partly written—Partly parol.**

When a contract is to be made out partly by written documents, and partly by parol evidence, the whole becomes a question for the jury. *Macpherson v. Fredericton Boom Company*, 1 *Han.* 837.

**7—Implied contract—Stevedore paying expenses.**

There is no implied contract between the shipper of deals and the stevedore (who is employed by the owner of the vessel and undertakes to bring the deals from the wharf,) that the stevedore shall pay the expense of wood-boats employed by the shipper to bring part of the deals to the vessel. *Ward v. McNichol*, 3 *All.* 499.

**8—Acceptance of offer of logs—Extent of.**

Plaintiffs, on the 16th May, 1854, made the following proposal to the defendant: "We hereby offer you our stock of spruce and pine logs, to be delivered to you at the usual place of delivery at Indiantown, with all possible

despatch from Washademoak lake, at the rate of," etc., which the defendants accepted in the following terms: "We hereby accept your offer for all the logs that you will have during the season." The season for receiving logs from the Washademoak lake was from about the 1st of May to the 1st November. *Held*, That the agreement applied to all logs which the plaintiffs owned or had contracted for at the date of their offer. *Polley v. Waterhouse*, 3 *All.* 291.

*Quære*, Whether the defendant's acceptance would not extend the agreement to all the logs which the plaintiffs might have during the season in the ordinary course of business. *Ibid*.

#### **9 — Construction — Authority — Question of law for Judge.**

D., who resided at Fredericton, had dealings in lumber with F., who resided at Providence R. I. D. wrote to F., asking him to join with him in the purchase at a price named, on joint account, of certain laths to be manufactured by M. F. telegraphed in reply: "Take the laths." M. was unable to manufacture without supplies; and I., at a meeting of E., M., and I., agreed to supply M., the laths cut by M. to belong to I., from the time they left the saw. I. being shewn the contents of the letter and telegram, agreed to furnish the laths to D. at the price named therein. The laths were delivered to D. and shipped by him to F., who sold them on joint account. *Held*, Fisher, J. *dissentiente*, In an action against D. and F. for the price of the laths, that D. had authority from F. to purchase from I. on joint account, the laths purchased being those cut by M., and referred to in the letter. That the authority being in writing, whether D. had authority to purchase or not, was a question of law for the Judge to determine, and not for the jury. *Inches v. Fogg and Dowling*, 2 *Han.* 149.

#### **10—Extra work—Special provisions.**

Plaintiff agreed to build a house for defendant for £3,250, and that no allowance beyond that sum should be

made for extra work or alterations, unless orders therefor in writing should be given by the architect in charge. During the progress of the work the plaintiff made alterations in the building by the verbal directions of the architect. After the building was finished, the architect made a valuation of the additional work and of certain omissions, deducting the latter from the former, and certified the balance to be due to the plaintiff. *Held*, That unless the defendant had dispensed with the proviso in the contract about the extra work, or had ordered the work to be done, or authorized the architect to do so, the plaintiff could not recover the amount. *Small v. McCullough*, 3 *Al.* 484.

*Semble*, That the defendant was not bound to pay the whole \$3,250 unless the contract was fully performed, and that the value of any work left undone should have been deducted from the contract price, and the extra work stand on its own merits. *Ibid*.

**11—Demand and refusal—Breach.**

The defendant for value received promised to deliver the plaintiff 30 chaldrons of coal on demand. The only demand on the defendant and the only refusal by him to deliver the coal, was a refusal to allow the plaintiff to put the coal on board a certain vessel of which defendant claimed to be the owner, though he offered to deliver the coal to the plaintiff who refused to receive it, unless he was allowed to put it on board the vessel. *Held*, That as there was no contract about the vessel, the defendant's refusal was no breach of the agreement to deliver the coal. *Quere*, Whether such an agreement is within 1 Rev. Stat. cap. 116. *Vanbuskirk v. Green*, 1 *Han.* 25.

**12—Presumption—Re-survey of lumber.**

Lumber sold and delivered subject to re-survey,—presumed to be according to provisions of Statute. *See Rankin v. Emery*, *Ber.* 330.

**13—Fulfilment of—Accord and satisfaction—Settlement binding.**

Defendant agreed to deliver plaintiff 100 tons of timber,

of a specified size and quality, at a certain time. He delivered 101 tons, partly within the time, but not of the size and quality required. Disputes having arisen respecting it, and also as to the defendant's liability to pay the expense of putting the timber in shipping order, it was agreed between them that if the defendant would pay this expense, the plaintiff would allow the timber at 89 tons at the contract price. In an action for non-delivery of the timber, it was left to the jury, whether the plaintiff had agreed to receive the timber, and waive all claim for damages for breach of the contract; and the jury having found in the affirmative. *Held*, No misdirection—and that the performance of the contract being in controversy between the parties, such a settlement was binding—the defendant's agreement to pay for trimming the timber, being a sufficient consideration for the plaintiff's promise. *Semble*, That what took place between the parties might be treated as an accord and satisfaction of the plaintiff's demand. *Turner v. Keiver*. 1 *Han.* 91.

**14—When binding on parties—Enforceable in Equity  
—Statute of frauds—Substituted contract—Pleading—Infant—Party to suit.**

C. (Plaintiff's mother) and M., daughters of S., were entitled to certain real estate in right of their mother, who died in 1826. S. married again, and subsequently, in 1841, made a will whereby he provided that C. and M. should each receive £1000 on their marriage, and that when his youngest son became of age, an equal share with his other children, of his property, should be invested for their benefit; after the death of either, her share to be divided amongst her children, the child to represent the parent in any division of property; no share to be deemed to have vested until paid, with the proviso that C. and M. should not be entitled to any benefit under his will unless they ratified his acts relative to their mother's real estate. In 1844, by deed in consideration of the legacies and provisions made for them by the last will and testament of S. they conveyed to him their real estate. C. married

in 1847, and died in 1851. In 1852. S. revoked the provisions in his will in favor of C. bequeathing the plaintiff £1000 on his coming of age. In 1858 S. died. *Held*, 1st, That S. could not revoke the provisions in favor of his daughters in his first will, and that the transaction was a contract capable of being enforced in equity. 2nd, That there was a sufficiently signed contract to satisfy the Statute of Frauds. 3rd, That the fact of C. having received certain advances from S., after her marriage, was no proof to establish a substituted contract. 4th, That during coverture C. could not enter into a contract to abandon the rights she acquired under the will of S. 5th, That the provisions in the will for the benefit of C. inured for the benefit of the plaintiff her son. 6th, That the plaintiff's infancy was no bar to his enforcing the contract, as he was entitled during infancy to the interest of his mother's share. 7th, That in equity a party who intends to rely on the Statute of Frauds must specially plead it or raise the objection in his answer. 8th, That under 17 Vic. cap. 18, it was not necessary for M. to be a party to the suit *Gilpin v. Scovil*, 1 *Han.* 379.

**15—With Partnership or personally — Question for jury on whole evidence.**

Where A. brings assumpsit for money had and received, against B., who defends on the ground that he is answerable to the representatives of A.'s deceased partner, and the testimony thereof is to be gathered from the entitling of accounts, the address of letters, as also from other circumstances. *Held*, That is was properly left to the jury on the whole evidence to determine whether B. had contracted with the firm, or personally with A. *Raymond v. Hay*, 1 *Kerr* 99.

**16—Statute of Frauds—Operation of—Year.**

A contract, not in writing, entered into on the 26th May, for the supply of a regiment with groceries for a year from the 1st June following, subject to be sooner determined in case the regiment should leave the Province, is void under Statute of Frauds. *Reed v. Harding*, 2 *Han.* 187.



**17—Bill of Lading—Entire contract.**

As a general rule the bill of lading, though containing different descriptions of goods belonging to the same person, is considered as an entire contract. *Neill v. Reid*, 4 *All.* 246.

**18—Specific performance—Lapse of time.**

Though in equity, time is not always the essence of a contract: *Semble*, That after a delay of four years specific performance will not in general be decreed. *Purves, v. Hume*, 3 *All.* 299. (*See Equity* 2.)

**19—Want of acquiescence in terminating contract.**

Where A. delivered timber to B., under an agreement that B. should ship as much as he could, and give A. credit for the amount, and B. having shipped what he thought fit, and given notice to A. to take away the remainder, and subsequent to such notice shipped a further quantity. *Held*, In the absence of any proof of acquiescence in such notice by A., that B. was not liable in an action of trover for the quantity shipped after the notice *Hughes v. Sutherland*, 1 *Kerr* 574.

**20—Rescission of contract—Evidence of Substitution of new contract—Liability—Question of Jury.**

Defendant agreed with the plaintiff in March, 1863, to carry deals from the plaintiff's mill at Fredericton, to St. John, during the whole of the coming season, at 2s. 6d. per thousand, and if plaintiff was obliged to give 2s. 9d. per thousand to others, he was to give that sum to the defendant. The plaintiff had made contracts for the delivery of deals in St. John, which he afterwards assigned to T. & P. (lumber merchants), together with the defendant's contract; and he also agreed to saw lumber by the thousand for T. & P.; and did saw for them under such contract from the beginning of the season till October. At the opening of the season the defendant went with his boats to the plaintiff's mill, but no deals were offered to him, and he heard that the plaintiff had sold his mill: in con-

sequence of this, he agreed with T. & P. to carry their deals for 55 cents per thousand, and continued to carry them from the plaintiff's mill, where they were sawed, till the latter part of September, when the mill stopped. *Held*, per Fisher and Wetmore, J. J. (Weldon, J., *dissentiente*), That there was evidence of the rescission of the contract between the parties, and of the substitution of a new contract with T. & P., which ought to have been left to the jury; and that the defendant was not liable on the contract for not carrying deals which the plaintiff cut on his own account after the 1st October. *Morrison v. Gale*, 1 *Pug.* 208.

**31—Liability to insure goods—Completion of contract.**

Plaintiff applied to the agent of an Express Company in Fredericton, to forward a case of furs to Halifax, to be sent to London, stating that he wished to have them insured. The agent said that he could not get marine insurance in Fredericton, but that if the plaintiff would write to S., the agent of the Company at St. John, he had no doubt he would do it, as he had done so for others. On the following day, the agent of the Company at Fredericton received the furs from the plaintiff, and signed a receipt stating that they were to be forwarded and delivered to the nearest connecting Express,—nothing being stated in the receipt about insurance. The furs were sent to S. at St. John, and were by him forwarded to Nova Scotia, and there taken charge of by another Company, who shipped them to London, and they were lost. At the time the plaintiff delivered the invoice of the furs to the agent at Fredericton, he also delivered him a letter addressed to S., in which the plaintiff stated that he wished S. to insure \$600 on the furs, and to forward them to Halifax immediately, as he wished to have them in London at a particular time. S. did not insure. *Held*, In an action against the Company for neglecting to insure, that the contract was complete when the agent in Fredericton received the furs and gave the receipt, which contained the terms of the contract; and that the letter to S. was only a

request to insure, and formed no part of the contract for the transmission of the furs. *McGoldrick v. Eastern Express Company*, 1 *Pug.* 138.

**22—Quality of article—Description—Representation.**

Defendants agreed to furnish the plaintiff with a quantity of coal from their mines. Coal from these mines, known as "Albert coal," was used almost exclusively for the manufacture of oil and gas, and the defendants knew that the plaintiff required the coal for the purpose of manufacturing it into oil, and they could have supplied an article fit for that purpose. *Held*, That the plaintiff was entitled to receive Albert coal of a fair merchantable quality, and fit for the purpose for which he required it; and that the contract was broken by the delivery of coal from the mines, so mixed with shale, as to be comparatively valueless for the purpose for which the plaintiff required it. *Spurr v. Albert Mining Co.*, *East. T.* 1871.

In contracts of this nature, it is not so much a question whether there has been a warranty, as, whether the article delivered by the defendant fairly answers the description of that which he agreed to sell. *Ib.*

**23—Contract — Representation — Acknowledgment by acts.**

By an agreement between plaintiff and defendant, therein described as Province Treasurer, for and on behalf of the Queen, the plaintiff agreed to procure—to be coined in England and delivered to the defendant—a certain amount of copper coin for the use of the Province. The Crown having refused to authorize the coining, the plaintiff made application to the Legislature for compensation, and a grant of money was made to him "to reimburse him expenses incurred in endeavouring to execute a contract entered into with the Provincial Government for a supply of copper coin—the same to be in full." *Held*, in an action against the defendant for falsely representing that he had the authority of the Queen to make the contract—1st, That the defendant, having acted under the direction of the Provincial Government which represented

the Crown, had the authority of the Queen : 2nd, That by accepting the grant of money from the Legislature, the plaintiff had acknowledged that the contract was made with the Provincial Government, and therefore that the defendant was not liable. *Sears v. Robinson*, 4 All. 366.

*Quære*, Whether the words of the agreement amounted to a representation that the defendant had the Queen's authority to make the contract. *Ibid*.

**24—Sale of logs—Cutting and hauling by vendor passing of property—Intention.**

Whether the property passes under an agreement respecting the sale of goods is in every case a question of intention.

H. agreed with G. to cut and haul for the latter from off the land of the former 2,000,000 ft. of spruce and pine logs, and to deliver the same in suitable rafts at a specified place as early the next season as the water would permit, for \$7 per thousand, the logs to be marked in a particular manner (described in the agreement), and to be G's property from the stump. *Held*. That when the logs were cut and hauled and marked as provided for in the agreement, the title in the property vested in G., and if H. got out a greater quantity than the 2,000,000, and marked them all in the same way and mixed them together, it was an appropriation of whole quantity to G. until his contract was filled. *Gibson v. McKean et al*, 3 Pug. 299.

**25—Delivery—Appropriation of property.**

By a writing, signed by the parties, S. agreed with D. to cut, haul and deliver a certain quantity of logs for D. Part of the logs were to be cut on lands licensed to D. by the State of Maine, and part on S.'s land. S. was to drive the lumber down the Aroostook river to Doyle's Landing, and D. was to take it there. No logs smaller than 15 feet long and 11 inches in diameter at the top end, and but few as small as that, were to be cut. The logs were to be marked with D.'s mark. They were to be scaled by D.'s

scaler, whom S. was to board. S. was to pay the stumpage. D. agreed to make advances, on which he was to receive a commission of 10 per cent. A second agreement for cutting, hauling and delivering a further quantity was made between the parties. This agreement was in some respects similar to the first one, but the place where the logs were to be cut was not mentioned. D. furnished the supplies. The logs were cut, hauled and driven down to Doyle's Landing. They were got out for D., and marked with his mark. The evidence was contradictory as to an actual delivery of the logs to D. D. took possession of them and drove them. S. said he refused to deliver the logs until he was paid, and that he sent a man down on the drive. The jury, in effect, found there was no actual delivery. *Held*, (by Allen, C. J., Weldon and Duff, J. J., Fisher and Wetmore, J. J., *dissentiente*.) That, under the agreement, as the lumber was cut, hauled, and marked with D.'s mark, there was an appropriation of it by S., which vested the property in D., without an actual delivery; that the word "deliver" in the agreement did not denote a transfer of title, nor show that S. retained the *jus disponendi* until he had made an actual delivery of the lumber to D.; but rather, that it did indicate the time and place, when and where, S.'s connection with the lumber should cease; and that even if there could be any doubt as to the property in the lumber so vesting in D., that when it was brought to D.'s landing, and D. took charge of it, it became his property by the terms of the agreement, without the formality of an actual delivery. *Sprague v. King*, 1 P. & B. 241.

**26--Delivery of logs—What amounts to—Damages.**

On the 19th November, 1872, M. entered into the following agreement with the plaintiff: "This is to certify that I hereby acknowledge that I have conveyed to John J. West, Esq., of the Parish of Johnston, Queen's County, all the spruce and pine saw logs that I shall get from now until next spring, to be his from the time they are cut, so far as what I shall be in debt to him, the said logs to be marked with the mark A. M. Signed, Wm. Marr. Dated 9th

November, 1872." Under the agreement, M., in the fall of 1872, went into the woods to cut logs for the plaintiff. In the early part of the season he hauled the logs which he cut into the Washdemoak lake; in the latter part he hauled them into Jolly Brook. The precise time when he commenced to haul to the latter place was not shewn; but McL., one of the defendants' witnesses, who hauled in the same neighbourhood, said that it was about the beginning of February. And the defendant, in his evidence, said that he continued to haul there until the latter end of March following. In the meantime, in the first week of March, the plaintiff went to see the logs on the Jolly Brook. He found five or six brows of logs there, containing about one thousand trees, all of which were marked A. M. M., who was hauling to these brows at the time, came there whilst the plaintiff was inspecting the logs. The plaintiff enquired of him whether these were the logs which he had cut for him under the agreement, and M. replied that they were. He told the plaintiff that there were about one thousand trees there, and going over the brow with the plaintiff and shewing the logs, he asked the latter how he liked them, and told him they were his logs. The plaintiff proved that he made advances to M., under this agreement, amounting to \$212.77, and he admitted having received the logs which had been hauled to the Washdemoak, from which he realized the sum of \$77.17. M. subsequently sold these logs to the defendant, R., and they came into the possession of the other defendants. The value of the logs at the time the plaintiff was on the brow was stated at \$400. The jury found for that amount. *Held*, (by Allen, C. J. Weldon, Fisher and Duff, J. J., Wetmore, J., *dissenting*,) That what took place between the plaintiff and M. in March amounted to a delivery, and that the property in the logs passed to the plaintiff. *Held*, (by Allen, C. J., Weldon and Duff, J. J., Fisher and Wetmore, J. J., *dissenting*,) That the measure of damages was the value of the logs at the time of delivery, and not the amount due from M. to the plaintiff. *West v. Routledge*, 1 P. & B., 674.

**27—Sale of timber to be hauled—Passing of property.**

M., by memorandum in writing, dated the 29th Dec., 1873, sold to H. 1,000 spruce and pine saw logs, and all above that number which M. might haul the ensuing winter, (stating size and quality), the logs to be delivered to H. on or before 1st June, in H.'s boom at Shediac, for which H. was to pay \$4.50 per thousand on delivery, less all advances made; the logs to be the property of H. as soon as they should be hauled to the yards or brows, and he then to have the option of taking possession of them, but the logs until delivery at the boom, to be at M.'s risk and expense. On October 29th, in same year, M. made an agreement with C. to cut and haul 200 spruce and pine saw logs, and to deliver them at a brow on Cocaigne River on or before 1st March, for which C. was to pay him \$3.00 per thousand; and C. also agreed to purchase at same time any more logs that M. might haul and deliver at same place. *Held*, 1. That under the agreement between H. and M. the property in any logs cut by the latter for the former under that agreement, and hauled to the yards or brows, would vest in H. without any delivery. 2. That under the agreement between C. and M. no property in any logs cut by the latter, would vest in the former without a delivery; and that any logs hauled by M. after the agreement with H. and got under that agreement, vested in him, and could not be affected by any subsequent delivery to C. *Hannington v. Cernier*, 3 *Pug.* 212.

**28—Property in Lumber—Non-payment of draft—Continuance of plaintiff's right in property.**

The plaintiff company being owners in fee of certain lands granted to C. & S. a license to cut lumber on the lands. By the license it was agreed *inter alia* that the stumpage was to be paid in the following manner:—"Said Company shall first deduct from the amount of stumpage on the timber or lumber cut by grantees on this license as aforesaid, an amount equal to the mileage paid by them as aforesaid, and the whole of the remainder, if any, shall not later than the 15th April next, be secured by good endorsed notes, or other sufficient security to be approved of

by the said company, and payable on the 15th July next, and the lumber not to be removed from the brows or landings till the stumpage is secured as aforesaid,"—and—"said company reserves and retains full and complete ownership and control of all lumber which shall be cut from the aforementioned premises, wherever and however it may be situated, until all matters and things appertaining to, or connected with this license shall be settled and adjusted, and all sums due, or to become due for stumpage, or otherwise, shall be fully paid, and any and all damages for non-performance of this agreement or stipulation herein expressed, shall be liquidated and paid. And if any sum of money shall have become payable by anyone of the stipulations or agreements herein expressed, and shall not be paid or secured in some of the modes herein expressed within ten days thereafter, then, in such case, said company shall have full power and authority to take all or any part of said lumber wherever or however situated, and to absolutely sell and dispose of the same either at public or private sale for cash, and after deducting reasonable expenses, commissions, and all sums which may then be due, or may become due, from any cause whatever, as herein expressed, the balance, if any there be, they shall pay over on demand, to said grantees after a reasonable time for ascertaining and liquidating all amounts due, or which may become due either as stumpage or damages."

C. & S. cut lumber and gave plaintiff a draft on J. & Co. for stumpage; according to agreement. The draft was accepted by J. & Co., and approved of by plaintiffs, but it was not paid at maturity. After giving the draft, C. & S. sold the lumber to J. & Co., who knew the lumber was cut on the plaintiff's land under the said agreement. J. & Co. failed, and the defendant, their assignee, took possession of the lumber and sold it. *Held*, That the acceptance of the draft was not a payment of the stumpage, that the property in the lumber did not pass to C. & S. until the stumpage was paid, and that the defendant was liable to pay the plaintiffs the amount thereof. *N. B. Rwy. Co., v. McLeod*, 1 P. & B. 257.



**29—Agreement to take Stock—Subscribing paper.**

The plaintiff company was about being organized, and defendant was asked to take stock in it, and subscribed his name to a paper prepared for that purpose, agreeing to take ten shares. *Held*, (per Ritchie, C. J. and Allen, J., Weldon, J. *dissentiente*), That this was an offer made by the Company on the one side, and accepted by the defendant on the other, and that a complete contract was formed which made him liable as a stockholder to assessments. *Held*, also, That it was not necessary that certain shares designated by numbers should be assigned to defendant, to make him liable. *European and N. A. Ry. Co. v. McLeod*, 3 *Pug.* 8.

**30—Completion of contract—Foreign Insurance Company.**

A policy of insurance issued in New York and delivered in Boston to a broker by whom it was sent to St. John to his agent, and by him handed to the defendants, who gave in return a premium note, was held not to have been complete until actually delivered, and the transaction was illegal under Act of Assembly 19 Vic. cap. 45, which prohibits any foreign Insurance Company from doing business in the Province without first filing a certificate in the Provincial Secretary's office. No indebtedness from the defendant to plaintiff was shewn, and no consideration as between them shewn. *Allison v. Robinson et al*, 2 *Pug.* 108.

**31 · Foreign Insurance Company—Carrying on business in Province—Illegality.**

A. held himself out as the agent in St. John of the Columbian Insurance Company, whose head office was in New York. His course of business was to receive applications for insurance addressed to the Company, which he would forward to B., an insurance broker in Boston. The latter would send the application to the Company, when, if it was accepted, a policy would be delivered to him, and the premium charged against him at the time. The policy was then forwarded by B. to A., who would deliver it to

the assured, taking the premium note direct to himself, and sending to B. his own note for nine-tenths of the amount (the balance being kept for commissions). *Held*, That this was an indirect carrying on of insurance in the Province by the Company, contrary to the Act of Assembly 19 Vic. cap. 45, and that a premium note given to A. could not be collected, and also, that the fact of the note being made to A. instead of to the Company, in no way distinguished this case from *Allison v. Robinson*, 2 *Pug.* 108. *Jones, &c., v. Taylor, Re Oulton*, 2 *Pug.* 391.

### **32—Performance within a year—Statute of Frauds—Uncertainty.**

The defendant undertook to give or procure for the plaintiff, a situation as clerk or book-keeper, at \$1,000 a year, in consideration for which the plaintiff was, for a certain sum agreed upon, to give the defendant a deed of his interest in certain lands, and to use his influence with the other heirs to procure deeds to the defendant. In an action brought against the defendant for breach of this agreement it was *Held*, 1st. That the contract was not void for uncertainty. 2nd, That it was not void under the Statute of Frauds, as being a contract not to be performed within a year. *Bennet v. Peck*, 2 *Pug.* 316.

### **33—Restraint of trade—Public Policy.**

An action against defendant, owner of a tug-boat in the harbour of St. John, for breach of an agreement entered into between the proprietors of sixteen tug-boats, respecting the towage of vessels according to what was known as —“the regular turn system.” By this they agreed, among other things, that every tug-boat should take its regular turn in order; that every ship coming into the harbour should count as such turn, and that such tug should be entitled to all her towage till she went to sea. That on an arrival of a vessel at Partridge Island, the tug, whose turn it might be, must be prepared to attend the vessel. If more than one vessel arrived, the tug, whose turn it might be, should have the option of choosing the largest vessel, the next in turn to choose from the remainder. That all

new vessels up or down the Bay of Fundy beyond Quaco or Musquash, should be towed on special terms to Part-ridge Island, and on arrival there, should be towed into the harbour by the steam-tug, and should, in falling to such tug's general turn, count as such, but if the vessel did not fall to said tug's general turn, then it should be allowed to said tug as a general turn ahead; and all tugs on the general turn list ahead of such tug which had not their general turn, should take the next vessel arriving as their turn. The agreement then prescribed the order of tugs for new vessels beyond Quaco and Musquash. The breach of agreement complained of was, that a new vessel beyond Quaco required to be towed into the harbour; that it was the turn of the plaintiff's tug to do the towing according to the agreement, but that the defendant, contrary to the agreement, towed the vessel into the harbour with his tug, and afterwards towed her to sea, though the plaintiff was ready and willing to do the work. On demurrer, the Court held the agreement to be void, as being contrary to public policy, and in restraint of the freedom of trade—the parties having restricted themselves from carrying on their own choice, but according to the will of others, and that the interest of the public, particularly of shipowners, would be prejudiced by giving effect to such an agreement. *Pratt v. Tapley*, 3 *Pug.* 163.

### **34—Promise made to another.**

Plaintiff sued up on the following instrument,—“12 months from the 26th June, 1873, I (defendant) will pay J. C. (plaintiff) \$90 for D. P., or otherwise settle the sum of \$90 for him, on a note that he says he gave J. C. for \$100. *Held*, That this was not a promissory note and required a consideration to support the agreement, and that it was not an agreement with the plaintiff, but with D. P. *Cochrane v. Caie*, 3 *Pug.* 224.

### **35—Two Meanings—Construction.**

Where an instrument is susceptible of two meanings, one of which is reasonable and probable, and the other

altogether improbable, it ought to be construed in the former sense, unless it is clear that the other construction was intended. J. agreed to deliver to M. a quantity of lumber. At the time of entering into the contract, the former signed a writing as follows:—"When the season's shipments are over, if M. cannot turn out \$8 for lumber, as paid Jones Jones, will take off 25 cents of each superficial, or the loss, if any." *Held*, That this meant that the deduction of 25 cents was intended to be a maximum sum, and that the words, "or the loss, if any," would only apply in the event of the loss being less than 25 cents per thousand. *Jones v. McIntosh*, 2 *Pug.* 343.

**Ambiguity in letter.**

*See* Accord and Satisfaction. *Weldon v. Vaughan*.

**36—Rescission—Fraud—Adoption—Stata quo.**

A person induced by fraud to enter into a contract, cannot, after he has acted under it so that the parties can no longer be placed in *stata quo*, avoid the contract. *Lloyd v. Union Ins. Co.*, 2 *Pug.* 498.

**As to necessary averments of fraud and plaintiff's knowledge of same.**

*See* Same case Pleading II. 57.

**37—Sale by ascertained measurement—Mistake.**

Where parties enter into a contract in which there is no fraud shewn, the Court will not make a new contract for them, nor rectify mistakes in it. Where a quantity of molasses was sold according to a certain gauge already marked on casks, defendant bound by that condition, although quantity fell short. *McLean v. Robinson*, 2 *P. & B.* 83.

**38—Overseers of the poor—Recognition of liability—Support of child.**

On evidence it did not appear by whose authority the child was taken to the party supporting it; but when the latter rendered his accounts to the overseers for sixteen weeks' support, they did not deny their liability, or raise

any objection whatever, but paid \$4 on account of the demand, and in the trial before a Justice of the Peace, one of the overseers expressly admitted their liability for the whole sum. *Held*, That there was sufficient evidence from which a contract might be implied. *Regina v. Archibald*, 2 P. & B. 250.

**39—Parol contract—Determination of—Easement.**

An easement cannot be created by parol, and a parol agreement of such would be determined by a conveyance to a third person from the party agreeing to give the easement. *Brewing v. Berryman*, 2 Pug. 115.

**A person induced by fraud to enter into a contract cannot, after he has acted under it, so that the parties can no longer be placed in statu quo, avoid the contract.**

*See* Pleading II. 57. *Lloyd v. Union Ins. Co.*

**Joint contract.**

**Sale of vessel under certificate of sale.**

Action for proceeds of sale by three out of four owners. Contract held to be a joint one, and that all the owners should be joined in action against defendant. *See* Action at Law. *Campbell v. Jones*.

**Agreement to build house and make payment in specified time of certain amount—Condition precedent—Necessary to aver in declaration.**

*See* Pleading I. 68. *Driscoll v. Barker*.

**Separate interest in contract.**

*See* Action at Law XIII.

**Damages on breach of contract.**

*See* Damages.

**Damages—Non-assignment of judgments, etc.—Injury to business.**

*See* Damages I. 9.

**Freight—Payment of—Implied contract.**

*See Shipping Law 13. Ferguson v. Domville.*

**Railway Acts, when treated as contracts between incorporators and the public.**

*See Mandamus. Re N. B. & C. Ry. Co.*

**Master and servant—Continuance of contract—Grounds of dismissal.**

*See Master and Servant. Grove v. Domville.*

**Contract, joint or several.**

*See Action at Law XIII.*

**CONTRIBUTION.**

**Loss of goods by jettison.**

*See Shipping Law 10.*

**Action for, on note—Surety.**

*See Consideration 8.*

**CONTRIBUTORIES.**

**Liability of stockholder.**

*See Winding Up Act.*

**Executors—Stock in name of, in bank—Liability.**

*See Winding Up Act.*

**CONVERSION.**

*See Trover.*

**CONVEYANCE.**

*See Deed.*

*Bill of Sale.*

**Wife should be party to—Seller of land should prepare conveyance.**

*See Vendor and Purchaser.*

**CONVICTION.**

*See Justice of the Peace.*

**CORONER.**

*See Venire.*

Jury.

**1—Authority to take limit bond where writ directed to, and arrest made by him.**

The coroner, though not specially named, has the same authority as the Sheriff to take a limit bond under the Act 6 Wm. IV. cap. 41, where the writ has been directed to, and the arrest made by him. *Earle v. Deveber*, 1 Kerr 848.

**2—Jury process—Sufficiency of.**

*Quære*, Whether it is necessary to direct any other but jury process to a coroner, where the only objection to the Sheriff is that he is related to the defendant. *See Stevenson v. Douglas*, Ber. 281.

**3—Duty of—Judicial—Absence of any juror.**

A Coroner's duty is judicial, and he can only take an inquest *super visum corporis*; and an inquest where the Coroner and jurors were not present at the same time is void. *Ex parte Wilson*, Trin. T. 1871.

**4—Inquest—Expenses.**

Where an inquest has been duly taken—*Quære*, Whether the Sessions are justified in refusing to pay the expenses under 1 Rev. Stat. cap. 182. *Ibid.*

**CORPORATION.****1—Summary proceedings.**

Since the Act 6 Wm. IV. cap. 93, establishing the writ of summons, a Corporation may be proceeded against in a summary action; and, in cases where the proceedings ought to be summary, the plaintiff will only be entitled to summary costs. *O'Connor v. The N. B. and N. S. Land Company*, 1 Kerr 276.

**2—Agent—Authority—Extent of.**

The Tobique Mill Company (an incorporated company,) authorized their agent, by power of attorney, "to manufacture logs into lumber at the mills, transport them to

market, and dispose of them" for the company's benefit. *Held*, That this did not authorize the agent to deliver over lumber at the mills, in payment of securities given by him on behalf of the company for debts contracted in the course of his agency; and that such delivery vested no property in the creditor. *Lombard v. Winslow*, 1 Kerr 327.

### **3—Making promissory notes.**

*Quere*, Whether the company could authorize their agent to make promissory notes; and if they could, whether he had a right to make notes in his own favour in payment of a debt due himself for his services? *Ibid*.

### **4—Contract not under seal—Agent—Authority—Estoppel by pleading.**

A written contract made in the name and on behalf of a corporation, called "The Lancaster Mill Company," by their agent, with the plaintiffs, whereby the plaintiffs for certain stipulated payments, which would amount to over £600, to be made by the company, engaged to cut, raft, and drive to the company's mills a large quantity of logs in the course of the ensuing season, is of such nature and extent as could only be made under the common seal of the corporation. *Held*, Therefore, In assumpsit brought for the recovery of the stipulated payment after the delivery of the logs at the mills, that the corporation was not liable—per Chipman, C. J., Botsford, J., and Carter, J. The corporation was not liable on the contract, because there was no sufficient proof of the agent's authority, of a recognition of the contract by the corporation, of the mills being in the tenure of the corporation, or of the appointment of officers under the act of incorporation to manage the business of the company—per Parker, J., the defendant, being sued as a corporation, and appearing and pleading as such in bar to the action, is estopped at the trial from disputing its existence as a body corporate, and its ability to contract in that capacity. *Seelye v. Lancaster Mill Company*, 1 Kerr 377.



**5—Assumpsit—When it lies against.**

Where money has been received by a manufacturing corporation under a parol agreement to make payment for the same in articles of their manufacture, which they have failed to perform ; an action of assumpsit lies to recover back the money. *Diamond v. The St. George Lime Company*, 2 Kerr 537.

**6—Letters patent—Presumption of—Proper issue of.**

Where a corporation is created by letters patent under the great seal of the Province, and under the signature of the Lieut.-Governor, it will be presumed that such letters patent were properly issued. *Doe dem. Commercial Bank v. Williston*, 8 Kerr 101.

**7—Admission of existence of corporation by what.**

Giving a mortgage to a corporation, and entering into a consent rule in an action of ejectment brought by a corporation, are admissions of the existence of the corporation. *Ibid.*

**8—Not liable to attachment for costs.**

A corporation is not liable to an attachment for non-payment of costs ; therefore, where a peremptory undertaking was enlarged on the application of a corporation (plaintiffs,) the defendant was allowed to sign judgments of non-suit if the costs were not paid in a limited time. *Trustees of Greenock Church v. Love*, 3 Kerr 179 See also *Doe v. Crawford*, 3 All. 266.

**9—Non-payment of money by collector—Action by.**

Where an act authorized the corporation of a city to raise money by assessment, and directed that the person appointed by them to collect the money, should pay it over to the chamberlain of the city ; the chamberlain, being only a servant of the corporation, cannot sue the collector for not paying over the money ; the action must be brought by the corporation. *Mayor, &c., of St. John v. Baldwin*, 3 Kerr 477.

**10—Church Corporation—Existence of—Name.**

A Church Corporation may exist under the Act 29 Geo. III. cap. 1, by the style of "The Rector, Church Wardens and Vestry," etc., though no rector has at the time been appointed; and a grant by that name is good. *Doe dem Rector, &c., of Queensbury v. Guion*, 1 All. 6.

**11—Powers—Exercise of by Church Wardens, etc.**

The Church Wardens and Vestry may exercise the powers given to the Rector, Church Wardens and Vestry, by the Act 29 Geo. III., cap. 1, as well where there never has been a Rector appointed, as where a vacancy is caused by the death or absence of the Rector. *Ibid.*

**12—Contract under Seal—Estoppel.**

A Municipal Corporation with certain defined powers, is not, by entering into a contract under seal, estopped from shewing its incapacity to make such a contract. *Jamieson v. The City of Fredericton*, 2 All. 128.

**13—Authority by Statute to erect building—Implied power.**

The Corporation of the City of Fredericton entered into a contract with the plaintiff for the erection of a building for a market house. *Held*, That sufficient authority was given them by the Act of Incorporation (11 Vic. cap. 61), and therefore that the contract was valid. *Ibid.*

**14**———A power to establish Fairs, necessarily includes a power to establish Markets. *Ibid.*

**15—Crown right—Setting up same to invalidate Contract.**

*Quere*, If the Corporation had no authority to establish a Market without license from the Crown, whether it could, after the performance of the contract, and in the absence of any interference by the Crown, set up the Crown right to invalidate the contract? and *Semble*, That after the performance of the contract, the corporation could not resist payment because of a defect in the title to the land on which the market-house was built—they retaining the possession of it. *Ibid.*

**16—Seal—Resolution not under seal.**

Defendant, a tenant of the Corporation of St. John, claimed compensation for some alleged damage to the land leased, caused by the corporation; and they passed a resolution, allowing him therefor, the amount of rent he would be liable to pay for the land for a certain time. *Held*, That not being under seal, the resolution was not binding on the corporation, and that the defendant could not set off the amount of rent so allowed, in an action by the corporation to recover money in his hands belonging to them. *Mayor, &c., of St. John v. Wilmot*, 2 *All.* 565.

**17—British Statute—Restraint of—Leases.**

*Quære*, Whether the Stat. 13 Eliz. cap. 10, restraining ecclesiastical persons from making leases for a longer term than 21 years, applies to Church Corporations in this Province. *Bedell v. The Rector, &c., of Fredericton*, 3 *All.* 217.

**18—Negligence—Liability for.**

A Municipal Corporation is liable to an action for negligence in the discharge of any duty imposed on them by their charter. *Green v. The Mayor, &c., of St. John*, 1 *Han.* 525.

**19—Trespass—Action by Corporation—No Rector.**

In the absence of proof of there being any Rector of a parish, an action of trespass for injury to the Parish Church may be brought in the name of the Church corporation. *Rector, &c., of St. George's Church v. Cougle*, 1 *Han.* 609.

**20—Summons—Requisite statement of cause of action.**

The summons issued against a corporation under the Act 12 Vic. cap. 39, sec. 16, should state the cause of action truly: where the summons was to answer in a plea of "debt," and the declaration was in *covenant*, an interlocutory judgment was set aside. *Gilmore v. The Liverpool, &c., Assurance Company*, *Hil. T.* 1871.

An affidavit of the service of a summons issued against a foreign Corporation, stated that the copy was served

upon E. A., "the agent of the above named Company." *Held*, That as by the Act 12 Vic. cap. 39, sec. 16, service upon an agent was only good in a suit against a foreign Corporation, the affidavit was insufficient, as it did not state that the defendant was a foreign Corporation. *Ibid*.

**21—Payment of money to a Society does not incorporate.**

The mere grant by an Act of the Legislature of a sum of money to a Society for a particular purpose, does not constitute it a corporation. The Municipality of York was authorized by Act 23 Vic. cap. 4, to issue debentures in a certain sum, to be appropriated in assisting The York County Agricultural Society to raise funds for the erection of permanent buildings for the purpose of holding annual shows and fairs. *Held*, That this did not create "The York County Agricultural Society" a Corporation. *Hodge v. Reid, Mich. T. 1872*.

**22**——Policies signed by president and countersigned by secretary as required by Act incorporating Insurance Company, valid without seal of company. *See Evidence VI. 5.*

**Agent Accredited.**

*See Principal and Agent 23.*

**23—Corporation of City of St. John.**

Are not bound by their charter as grantees of Crown to build or keep in repair wharves or sea walls for the protection of the city lands from the sea. No such implied duty by charter. *See Coram v. Mayor, &c., of St. John, 1 Han. 441.*

**24—Power to change name.**

An incorporated Company has no power to change its corporate name without the authority of the Legislature. *Lloyd v. E. B. N. A. Rwy. Co. et al, 2 P. & B. 194.*

Conveyance to Company by corporate name before incorporation does not pass property. *See Bill of Sale. (Same case).*

**25—Proof of Incorporation—Pleading.**

In an action brought by plaintiffs in their corporate name against defendants as endorser of a promissory note, the defendants pleaded no endorsement and want of presentment. *Held*, That under these issues, the plaintiffs were not bound on the trial to prove their incorporation. *Bank of Nova Scotia v. Mason*, 2 *Pug.* 460.

**26—Incorporation not traversed—Proof.**

In an action against defendants in their corporate capacity as endorsers in a promissory note, the defendants pleaded no endorsement and want of presentment. *Held*, That under the Common Law Procedure Act 1873, the plaintiffs were not bound to prove their incorporation on the trial of cause, as by that Act whatever is not traversed is admitted. *Bank of Nova Scotia v. Morrow*, 2 *Pug.* 460.

**27—Power of corporation—Allowance of salary.**

The directors of a Company passed a resolution allowing their president a salary of \$1,200, for the year then current, and ordered that a certificate of indebtedness under the corporate seal should be issued to him in said sum, upon which the president caused the corporate seal to be attached to the certificate. There was no resolution of the stockholders voting the president remuneration for his services; nor was there any provision, either in the Acts of Incorporation, or the By-laws of the Company for such remuneration. *Held*, in an action brought on this certificate, That the president was not by law entitled to receive pay for his services; that the board of directors had no right to pass the resolution referred to; that the act of affixing the corporate seal to the certificate was of no legal force, and it was open to the Company to resist payment in a Court of law. *Fellows v. The Albert Mining Co.*, 3 *Pug.* 208.

**28—Nuisance—Right to remove—High and low water mark.**

The plaintiff was the owner of lot No. 1 in the City of St. John, granted nine months before the charter of the

city, which lot was, by the terms of the grant, to extend to low water mark. He was in the act of erecting a pier on the land between high and low water mark, when he was interfered with by the defendant, acting under the authority of the corporation, who removed the pier as an obstruction and a nuisance. Trespass being brought, *Held*, (Weldon, J., *diss.*) That the plaintiff's grant was subject to the *jus publicum* of passing and repassing between high and low water mark, and that the corporation, who are by law the conservators of the harbour, were justified in removing the obstruction. *Brown v. Reed et al*, 2 *Pug.* 206.

**Action against Corporation—Allegations in declaration—Public streets under control of—Evidence.**

*See* Pleading I. 75, *Gordon v. Mayor, &c., St. John.*

**Assessment of Stock.**

*See* Assessment.

**Foreign Insurance Company—Illegally carrying on business in Province.**

*See* Contract 30, 31.

**The property of a Corporation is subject to attachment.**

*See* Attachment 57.

**Foreign Corporation—Liability to Garnishee—Process.**

*See* Attachment.

**Chairman—Proof of being.**

*See* Evidence XI. 53.

**Water Company—Obligation to keep supply of water.**

*See* Water Company.

Corporation of Saint John have no right to limit by contract their power to make by-laws within their control under the charter. *See* By-Laws 5.

*See* Joint Stock Company.

**CORPORATE NAME.**

*See* Church of England. *See* Corporation.

**Misdescription.**

Where the notices and orders upon which an action under the Winding Up Act was founded, were entitled, "The President, Directors and Company of the Westmoreland Bank, in the County of Westmoreland,"—the corporate name being—"The President, Directors and Company of the Westmoreland Bank." *Held*, No misdescription, the words being merely an addition of the locality. *McKenzie v. Wiswell*, 1 *Han* 503.

**COSTS.**

- I. RECORD AND SUMMARY—(ALLOWANCE OR DISALLOWANCE OF COSTS.)
- II. TAXATION OF COSTS—(WHAT ALLOWED.)
- III. NOTICE OF TAXATION.
- IV. REVIEW OF TAXATION.
- V. PARTICULAR PROCEEDINGS—PARTICULAR PERSONS.
- VI. SEVERAL DEFENDANTS—SEVERAL ISSUES.
- VII. SECURITY FOR COSTS.
- VIII. DOUBLE COSTS.
- IX. OFFER TO SUFFER JUDGMENT BY DEFAULT UNDER ACT 18 VICT. CAP. 9.
- X. MISCELLANEOUS.

**I.**

RECORD AND SUMMARY—ALLOWANCE OR DISALLOWANCE OF FULL COSTS.

**1—Recovery under £5.**

Where plaintiff recovered less than £5, in a case referred at *nisi prius*, the original demand being also less than that amount, a suggestion will be entered on the roll to deprive him of costs under the Act 50 Geo. III., cap. 17. *Ferguson v. Holmes*, *East. T.* 1831.

**2—Verdict *prima facie* evidence of amount.**

The amount of the verdict is *prima facie*, the amount of the demand for which the action was brought; and when the amount recovered was under £5, the plaintiff was deprived of costs under the Act 50 Geo. III., cap. 17. *Dickenson v. Balloch*, Ber. 24.

**3—Circumstances of case govern Court in depriving plaintiff of costs.**

The Court will not deprive the plaintiff of costs in all cases *ex contractu*, where the verdict is under £5, but will look to all the circumstances of the case. *McIlhaney v. Wiswell*, Ber. 67.

4—Where the verdict in an action for use and occupation was for less than £5, but the plaintiff's right to the land, and the construction of a deed under which he claimed were disputed, he will not be deprived of costs under 60 Geo. III., cap. 17. *Black v. Kirk*, Ber. 81.

**5—Defendant disputing balance on account rendered**

Where the verdict was for £11, plaintiff was allowed full costs, though he had rendered an account to the defendant before action brought, shewing credits and a balance due of less than £20—the defendant having disputed the balance and thereby rendered it necessary for plaintiff to sue for his whole demand. *Douglas v. Hanson*, Ber. 121.

**6—Discretionary power.**

Defendant gave plaintiff a note for £22, payable in timber; he afterwards delivered him some timber and an ox, which he claimed to have been received in satisfaction of the note; plaintiff recovered a verdict for £14. *Held*, That he was entitled to full costs under the discretionary power given to the Court by the Act 4 Wm. IV. cap. 41. *Holland v. Close*, Ber. 344.

**7—Important rights involved—Trover.**

When important rights were involved in an action, the plaintiff was allowed full costs, though he recovered less



than £20, and the action might have been brought under the Summary Act (4 Wm. IV. cap. 41). *Coombes v. Caldwell*, 1 Kerr 127.

**8—Reference to Arbitration—Award less than £5.**

Where a cause was referred to arbitration, the award to be entered as a verdict, and an award was made in favour of the plaintiff for £8, he was allowed summary costs, it appearing by affidavit that his account, as allowed by the arbitrators, was about £20, and was reduced by the defendant's account,—notice of set-off having been given in the action, and it not being clearly shewn that the defendant's account was a payment. *Doyle v. Dougan*, 1 Kerr 161.

**9—Assault and Battery—Verdict less than 40 shillings.**

In an action for assault and battery where the verdict is for less than forty shillings, it is discretionary with the Judge whether he will certify or not, in order to entitle the plaintiff to costs under the Act 22 and 23 Car. II., cap. 9. *Ewing v. Scott, Trin, T.* 1834.

**10—Title to land.**

The plaintiff is entitled to costs under the Act 30 Vic. cap. 10 in an action for overflowing his land by means of a mill-dam ; the defendant claiming his right to do so, by permission of a former owner of the land, and going into evidence of that right, though he afterwards abandoned it. *McLeod v. Murray*, 2 Han. 198.

**11—Title to land—County Court.**

Where the declaration contained counts for trespass, *quare clausum fregit*, for assault, and for slander ; but the plaintiff recovered for the assault only—there being no dispute about the plaintiff's title to the land—a certificate for costs was refused under the Act 30 Vict. cap. 10, sec. 21—the amount recovered, being within the jurisdiction of the County Court and the count for trespass to the land having been improperly included. *Bradley v. Ferguson*, East. T. 1871.

**12**——In trespass *quare clausum fregit*, and for an assault, the defendant gave notices of defence,—*liberum tenementum* as to the trespass, and a justification of the assault in defence of his possession. The question of title was principally in dispute, and the plaintiff recovered on both counts. On motion for a new trial, the plaintiff abandoned the count for trespass, and the verdict, which was confined to the count for the assault, was excessive. *Held*, That as the defendant justified the assault as the owner of the land, the title to land came in question in connexion with the assault, and therefore the plaintiff was entitled to a certificate for costs under the Act 30 Vic. cap. 10. *Burke v. Niles, East. T.* 1871.

**12a—Recovery for assault only.**

Where in trespass *quare clausum fregit*, and for assault, the plaintiff recovers for the assault only; he is not entitled to the costs of the pleadings or evidence applicable exclusively to the issue, on which he was unsuccessful. *Burke v. Niles, 1 Pug.* 361.

**13—Judge certifying under Act 30 Vic. cap. 10.**

Where a cause is referred to arbitration by an order of *nisi prius*, the presiding Judge has power to certify for costs under the Act 30 Vic. cap. 10, sec. 21. *Patton v. Harding, East. T.*

**14—Assignee of Note for lumber—Delivery after action.**

Where the assignor of a note payable in lumber obtained a verdict for nominal damages, in consequence of the debtor having delivered the lumber to the assignor after action brought, the Court granted the plaintiff a certificate for full costs. *Green v. Williston.* 3 *Kerr* 110.

**15—Trespass—Claim of Title—Certificate.**

Where the trespass is committed under a claim of title, or with the intent to oust the plaintiff from the possession of the land, the Judge may certify under the Statute 22 and 23 Car. II. cap. 9, to entitle the plaintiff to full costs. *Morrison v. McAlpin,* 2 *Kerr* 86.

**16—Certificate—Time for granting.**

Such certificate may be granted within a reasonable time after the trial, and an application therefor is not too late if made the day after the trial is over. *Ibid.*

**17—Time of making application for Certificate.**

An application to the Judge who tried the cause for a certificate to deprive an acquitted defendant of costs, under the Act of Assembly 7 Wm. IV. cap. 14, sec. 24, is not too late if made before the judgment is signed, though nearly two months after the verdict. *Crane v. Cunard*, 3 Kerr 407.

**18**———The Statute 43 Eliz. cap. 6, authorizing a Judge to certify to deprive a plaintiff of costs, is in force here. See British Statutes.

**19—Cognovit—Damages laid at £50, conditioned for payment of £17.**

Where A., an attorney, sued for a debt of £17 in an action not summary, and the defendant gave a cognovit in which he confessed the damages laid in the declaration (£50), but it was thereby stipulated that in case of default of payment of £17 with costs, to be taxed by a certain day, the plaintiff should be at liberty to enter up judgment for the £17. *Held*, That he was entitled to summary costs only. *Harding v. Parker*, 2 Kerr 7.

**20—Defendant suffering judgment over £5.**

When the defendant suffers the damages to be assessed and final judgment signed for a debt over £5, the Court will not entertain a motion to deprive the plaintiff of costs, on the ground that a payment had been made before action brought, whereby the debt was reduced below £5. *Bennet v. Morse*, 2 Kerr 624.

**21—Set-off—Appropriation.**

Where the maker of a promissory note delivered the payee a quantity of hay without making any specific appropriation of the amount towards the paying of the note, and on a subsequent demand of payment claimed no deduction on account of the hay. *Held*, In action on the

note, that the value of the hay could only be considered as a set-off, and that the plaintiff was entitled to costs, though the verdict was for less than £5. *Barlow v. Clark*, 3 Kerr 485.

**22—Damages under £20—Assumpsit.**

When the damages in assumpsit are under £20 the plaintiff is only entitled to summary costs though the defendant suffered judgment by default and took no steps to be present at the taxation and object to the costs. *Street v. The Saint Andrews Steam Mill Co.*, 1 All. 194.

**23—Set-off—Goods furnished—Verdict below £5.**

If a defendant gives a notice and particulars of set-off which are principally made up of goods furnished the plaintiff, it shews *prima facie* that it was not intended as a payment, and the plaintiff is entitled to costs though the verdict is below £5. *White v. Dawson*, 2 All. 51.

**24—Special notice of defence—Effect of.**

The construction given in England to the Statute 22 and 23 Car. II. cap. 9, is part of the law of this Province, and is not affected by the Act of Assembly 13 Vic. cap. 32; therefore in trespass *quare clausum fregit*, the plaintiff is entitled to full costs though the verdict is under forty shillings, if the defendant gives notice under the Act, of leave and license, and relies solely on that defence. *Marks v. Gilmour*, 3 All. 170.

**25—Cause referred at Nisi Prius—Order of Judge for full costs.**

Where a cause is referred at *Nisi Prius*, and judgment on the award is to be entered as a verdict, the Judge of the Court of *Nisi Prius* may make an order for full costs, where the plaintiff's demand is reduced by set-off; and such order may be made *ex parte*. *Seelye v. Styles*, 3 All. 246.

**26—Justices Court—No jurisdiction—Contract.**

The Rev. Stat., cap. 137, sec. 43, depriving a plaintiff of costs where he does not recover more than £5, only ap-

plies to cases in which Justices of the Peace have jurisdiction ; therefore in an action for non-performance of a contract to deliver goods, the plaintiff is entitled to costs without a Judge's order, though he recovers less than that amount. *Rideout v. Stevens*, 1 *Han.* 28.

**27—Tender—Judgment accepted for amount within County Court jurisdiction.**

Plaintiff brought an action in the Supreme Court against defendants as administrators, who tendered a judgment for \$45.10, which was accepted. On a motion to review the taxation of costs on the ground that the plaintiff was deprived of costs by the County Court Act, 30 Vic. cap. 10, sec. 21, Consol. Stat. cap. 51, sec. 50, it was shown that plaintiff claimed about \$650, and that he accepted the amount tendered, because the estate was insolvent, and would not pay more than 10 cents on the dollar. *Held*, That under these circumstances, plaintiff was entitled to costs, his claim being for more than he could have sued for in the County Court. *Morrice v. Wilson*, 2 *Pug.* 225.

**28—Offer to suffer Judgment by default.**

Where a plaintiff accepts an offer to suffer judgment by default under Consol. Stat. cap. 37, sec. 127, he is entitled to sign judgment for the amount of the offer and the full costs. Where the offer is for a sum within the jurisdiction of the County Court, the plaintiff may shew by affidavit that the action was properly brought in the Supreme Court. *Peppers v. Johnston*, 1 *P. & B.* 502. See *Infra IX.*

**29—Recovery of amount within jurisdiction of County Court.**

30 Vic. cap. 10, sec. 12, Consol. Stat. cap. 51, sec. 50. The plaintiff having in an action on the case against a sheriff for a false return, recovered an amount under \$100, the Court refused to allow costs. *Deveber v. Palmer*, 2 *Pug.* 297.

**30—Certificate for Costs—Refusal by Judge.**

Plaintiff, in an action for work and labour, recovered a verdict for \$60. An application was made to the Judge

who tried the cause for a certificate for costs, on the ground that as there was notice of set off and evidence was given under it, it was to be presumed the jury had reduced plaintiff's claim by the set off. The Judge refused the application, being of opinion plaintiff had recovered more than his services were worth, and that the action should never have been brought, and the Court refused to interfere with his discretion. *White v. Belliveau*, 3 *Pug.* 109.

**31—Verdict of Jury not conclusive.**

Where plaintiff sues in the Supreme Court and only recovers an amount within the jurisdiction of the County Court, the Judge who tries the cause has power under section 21 of the Act 30 Vic. cap. 10 (Consol. Stat. cap. 51, sec. 45,) to give plaintiff a certificate for costs, provided there appears reasonable grounds for bringing the action in the Supreme Court, and the verdict of the jury is not conclusive. *Nevers v. Duffy*, 3 *Pug.* 136.

**32—Set off—Payment or not.**

*Prima facie* goods delivered are not a payment, and without an agreement of some kind that they are intended to be in payment of a debt, one party, by his own act, such as rendering an account, with the goods credited cannot make them so. Where a party having a claim for upwards of \$20, sued in the County Court, and defendant put in a set off of a barrel of flour, the amount of which had been credited by plaintiff in an account rendered before action brought, but there was no evidence of any agreement that it should be a payment, and the price of the flour was deducted by the jury from plaintiff's claim, so that he received an amount under \$20. *Held*, That he was entitled to a certificate for costs. *Little v. Caie*, 3 *Pug.* 386.

**33—Appeal—Prosecution of in Divorce Court—Jurisdiction of Supreme Court to grant costs to prosecutor.**

The Supreme Court, on hearing an appeal from the Divorce Court, has no jurisdiction to grant costs to the

wife pending the suit, to enable her to prosecute the appeal—no such application having been made to the Court below. *Hunter v. Hunter*, 5 All. 573.

## II.

### TAXATION OF COSTS.

#### **34—What allowed—Commission to examine.**

Cost of a Commission to examine witnesses are costs in the cause under Act Wm. 4, cap. 84. *Fergus v. McIntosh*, Ber. 91.

#### **35—Setting aside verdict—Offer to confess judgment—Costs of first trial—Commission.**

A verdict for plaintiff in an action on a policy of insurance claiming for a total loss, was set aside for misdirection: after notice given for a second trial, defendant offered to confess judgment for a sum amounting to a partial loss only, which the plaintiff accepted. *Held*, That he was not entitled to the costs of the first trial. *Wood v. Stymest*, 5 All. 429.

**36**———The expense of a Commission to examine witnesses taken before the first trial of a cause, but not used, will not be allowed to the plaintiff as a necessary preparation for the second trial. *Ibid*.

#### **37—Attendance of Solicitor—Evidence not used.**

The charges of a Solicitor attending the execution of a commission to examine witnesses in England, and the expense of taking evidence *de bene esse* in this Province, were not allowed on the taxation of costs, the evidence not having been used on the trial. *McGivern v. Stymest*, 5 All. 340.

**38**———A fee of one shilling only is taxable for an attorney attending a Judge on summons. *Ibid*.

#### **39—Witnesses.**

The expenses of a witness coming from England to this Province to give evidence will be allowed in the costs. *Light v. Abel*, 6 All. 406.

**40**——The mileage of a witness travelling from the State of Maine to the County of Northumberland in this Province, allowed in the taxation of costs. *Judkins v. Parker, C. Ms.* 151.

**41—Materiality of witnesses.**

Where issues are found for both parties, it must appear on taxing costs that the witnesses were material to prove the issue found for the party who charges for their attendance, and where the affidavits were not sufficient for that purpose, and copies had not been served on the opposite attorney, the Court set aside the judgment and ordered a new taxation. *Crookshank v. McFarlane*, 3 *All.* 18.

**42a—Election Law—Allegations—Materiality of witnesses to prove.**

Where, on the trial of an Election Petition, the Judge disallowed the costs of certain allegations in the petition, the affidavit of the attendance of witnesses used in taxing costs should shew that the witnesses were material to prove these allegations in the position on which costs were allowed. *Herbert v. Hannington*, 1 *Pug.* 324.

**43—Notices—Publication—Costs.**

Publication of notices in a newspaper—"for three consecutive days"—under the 69th sec. of the Act. 32 Vic. cap. 32, cannot be made in a weekly newspaper. The petitioner is not entitled to the costs of publishing notices in a newspaper, and of posting. *Ibid.*

**44—Cause put off—Order to pay expenses—Prima facie taxable Costs.**

A trial being put off by a Judge's order upon the defendants paying to the plaintiff "all costs incurred in preparing for trial and the expenses of one D. M. from Canada who was sent for, should he attend as a witness." *Held*, That the *prima facie* construction of the order was the taxable expenses of the witness, and if anything more was agreed to be paid, the *onus* was on the claimant to shew it. *Pollock v. Ritchie*, 3 *Kerr* 351.



**45—Voluntary attendance.**

If a witness attends voluntarily, it is not necessary to serve him with a subpoena in order to be entitled to charge for his attendance. *Flaglor v. Richards*, 1 *All.* 599.

**46—Attendance as juror.**

If a person subpoenaed as a witness attends the Court as a juror, or is too much intoxicated to be examined, he cannot recover his fees; but if they have been paid, the party paying them is entitled to have them taxed, and the ordinary affidavit of the witness's attendance and materiality *prima facie* shews the payment. *Murray v. Williston*, 1 *All.* 492.

**47—Sufficiency of affidavit—Payment by adverse party.**

It is sufficient, in order to obtain the taxation of witnesses fees, to shew by affidavit that they have attended during the period charged, and were material, without shewing the payment of their fees; and it will be no answer that they were also subpoenaed and paid by the other party, unless he has given timely notice of such payment to the successful party. *Murray v. Williston*, 1 *All.* 355.

**48**———Affidavit should state belief that the witness attended the number of days charged. *See Taylor v. Travis*, 3 *All.* 505.

**49—Evidence—Application to one count of declaration—Costs confined to same.**

In an action for libel, consisting of five counts, and resulting in a verdict for defendant, a new trial was ordered; after which it was consented that the deposition of the witnesses, taken under a commission obtained by the plaintiffs, and made use of in evidence, might be used again on the next trial, whereat the witness himself appeared, and was examined for the plaintiff *viva voce*; after which his depositions under the commission was put in and read with the consent of all parties; and there was a verdict for the plaintiff on the first count of the declaration, and no find-

ing on the other counts. *Held*, That the taxing officer was right in disallowing the expenses of the commission, and also the costs of the declaration, *nisi prius* record, and judgment roll, except so far as related to the first count of the declaration. *Andrews v. Wilson*, 3 *Kerr* 127.

#### **50—Evidence generally—General issue.**

In an action of trespass, in which the general issue only was pleaded, a verdict was given against the plaintiff on the ground of his not shewing sufficient possession. *Held*, That the defendant was entitled to the costs of all his evidence, though part of it was adduced to prove title in himself, in which he failed. *Gaudin v. McKilligan*, 2 *All.* 477.

*Aliter*, If the evidence had been offered under a plea of *liberum tenementum*, or a special notice of defence, not admissible under the general issue. *Ibid.*

If a clear case of over allowance for the attendance of witnesses is made out, the Court will review the taxation of costs. *Ibid.*

#### **51—Allocatur.**

A new trial having been granted on payment of costs, an *allocatur* allowed for shewing cause was taxed against the party who obtained the new trial. *Held*, That such taxation was wrong, and the costs accordingly deducted. *McEachern v. Ferguson*, 3 *Kerr* 355.

#### **52—Bribery Act—Counsel fee.**

A Judge has no power to tax a higher counsel fee than five guineas on the trial of a cause under the Bribery and Corruption and Election Petition Act, 1869. *Herbert v. Hannington*, 1 *Pug.* 169.

#### **53—Copies of deeds.**

Where copies of deeds are adduced under the Act of 7 Wm. IV. cap. 15, the successful party is entitled to the costs of all copies actually read in evidence. *Doe dem Thompson v. Allanshaw*, 1 *Kerr* 93.

**54—Change of attorney—Subpœnas.**

Costs of changing the attorney are not taxable against the adverse party. The number of subpœnas allowed must depend upon the particular circumstances of each case. *Roberts v. White, Trin. T., 1831.*

**55 Replevin—Costs—Claim by third party.**

*Quære*, Whether the plaintiff in replevin is entitled to recover against the defendant as part of the costs in the cause, the costs of the proceedings taken under a writ *de proprietate probanda* issued upon a claim of property put in by a third person under the 1 Rev. Stat. cap. 126, sec. 12? *Held*, per Ritchie C. J., and Allen, J., That he is; N. Parker and Wilmot, J. J., *contra*. *Goddard v. Tuck, 6 All. 375.*

**56—Different issues.**

In replevin, where some issues are found for the plaintiff and some for the defendant, each party is entitled to costs on the issues found in his favour. *Dickinson v. Ketchum, Ber. 63.*

**57—**Where a defendant pleads *non cepit*, and property on which issues are joined, and succeeds on the first issue only, he is entitled to the general costs of the cause, and is liable to pay the costs of the other issue. *Stephenson Milliken, 1 Kerr 56.*

**58—Inquisition.**

When the verdict is for the defendant on an inquisition taken on a writ *de proprietate probanda*, under the Act 4 Wm. IV. cap. 38, the defendant is not entitled to the costs of the inquisition. *Wilson v. Curry, Mich. T., 1834.*

**58a—Replevin bond—Counsel fees.**

The plaintiff's attorney in an action on a replevin bond, cannot add to the taxed costs, a sum paid by the defendant for counsel fees. The costs mentioned in the condition of a replevin bond mean taxable costs. *Steen v. Hanson, 4 All. 589.*

**59—Sheriff's fees.**

Sheriff's fees, on executing a writ of replevin, being part of the general costs of the cause, are not taxable in the costs of opposing a rule to set aside the writ, as having been improperly issued. *McGowan v. Betts*, Mich. T., 1871.

**Replevin—Witnesses—Materiality.**

See No. 116.

**60—Reference of cause to arbitration—No direction as to entering up judgment.**

A cause was referred to arbitration, under a Judge's order, which directed that the costs should abide the event of the award, and that judgment should be entered up for the successful party, but without directing in what manner it was to be entered up—(the arbitrators made an award in favour of the plaintiff for £2 4s.) *Held*, That as no judgment could be entered up on the award, the plaintiff was not entitled to costs, either under the Act of Assembly 4 Wm. IV. cap. 45, or the Statute of Gloucester. *Burns v. Chapman*, 3 Kerr 192.

**61—Charge of arbitrators—Taxed costs.**

Where a cause was referred *at nisi prius* the award to be entered as a verdict—"with costs to be taxed"—the charge of the arbitrators for their services cannot be allowed in the costs. *McMahan v. Dibble*, Trin. T., 1831.

**62—Motion for judgment.**

A counsel fee is taxable on a motion for judgment as in a case of a non-suit, though the motion is not opposed. *York County Mutual Insurance Co. v. Hartley*, East. T., 1865.

**63—Rule nisi for new trial.**

Where a rule *nisi* for a new trial is refused, a fee of 6s. 8d. is taxable to the opposite party for counsel attending to hear the motion. A charge for brief for argument is not taxable until a rule *nisi* has been granted, even though notice of the motion has been given pursuant to the rule of Michaelmas Term, 1st Vic. *Wright v. Merriethew*, 2 All. 520.

**64—Judgment by default—Taxable items only allowable.**

On a judgment by default on a summary action, no costs are taxable for items not specified in the table of fees in the Act 12 Vic. cap. 40. *Snodgrass v. Johnston* 2 All. 200.

**65—Endorsement of sheriff on writ, whether conclusive as to fees.**

See Sheriff 5.

**66—Equity—Abbreviated bill.**

A copy of the abbreviated bill used on equity appeal not allowed in the costs, in addition to the copy used at the original hearing, where the same counsel argues both the original hearing and the appeal. *Gilbert v. Campbell*, 5 All. 440.

**67**———Costs of abbreviating pleadings and affidavits used in opposing an application for an injunction, not allowed in the costs of opposing a second application, the same counsel appearing on both motions, and it not being shewn that a second abbreviation had actually been made. *Hendricks v. Hallet*, 1 Han. 170.

**68—Equity appeal.**

Where parties do not fairly state their cases, and their conduct does not appear to have been *bona fide*, neither of them will be entitled to costs on an equity appeal. *Hillock v. Frissle*, 5 All. 655.

**69—No jurisdiction—Power to grant costs.**

Where a Judge in Equity declines to hear an appeal because the Court has no jurisdiction, he has no power to give costs to the party opposing the appeal. *Ex parte Stockton*, Mich. T., 1871. (See also *Bustin v. Howell*, 1 All. 596.)

**70—Appeal in Equity—Scale of costs.**

On an appeal from the decision of a Judge in Equity, the costs of appeal are to be taxed according to the Scale of Costs in Equity. *Hannington v. Harshman*, 1 Pug 332.

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**71—Foreclosure of mortgage—Mortgagor's equity of redemption transferred—Plaintiff's knowledge of.**

A mortgagor was made defendant in a foreclosure suit, appeared thereto and answered, disclaiming any interest in the property. On motion to dismiss the bill as against the mortgagor—*Held*, That as the plaintiff either knew or had the means of knowing, before commencing the suit, that the mortgagor had conveyed away his equity of redemption in the property, the mortgagor was entitled to his costs. *Wilson v. Hornbrook and wife and McKenna*, 1 *Han.* 167.

**72—Co-defendants—Practice.**

In general, payment of costs between co-defendants is not directly ordered, but the plaintiff is ordered to pay the costs to the defendants to whom they are decreed, and to add them to the general costs in the cause, and recover them from the other defendants. *Johnston v. McCartney*, 1 *Han.* 227.

**73—Travelling fees—Cause postponed.**

The plaintiffs resided at Somerville, near Boston. The cause was called on for trial about 1 p.m., and the trial was put off on the defendant's undertaking to pay the costs of the day. The plaintiffs left Boston the next morning to attend the trial. The clerk on taxation of costs allowed them their travelling fees. *Held*, That while it was the duty of the plaintiffs' attorney to use all reasonable efforts to stop the plaintiffs from coming, he was not bound to telegraph unless the defendants requested him to do so, and offered to pay the expense of telegraphing, and that the clerk was right in allowing the plaintiffs' travelling fees. *Gibson and Wife v. North B. & M. Ins. Co.*, 1 *P. & B.* 573.

**74—Leave to reply—Demurrer—Amendment—Remanet.**

Plaintiff got leave to reply and demur to several of defendants' pleas under the Common Law Procedure Act

1878. Notice of trial was given and the cause entered in the docket at *nisi prius*, and made a remanet. On the argument of the demurrer, defendants applied for and obtained leave to amend the pleas demurred to, on payment of costs. *Held*, That in taxing the costs the clerk was wrong in allowing for brief, notice of trial, subpoena, Judge's fee and *nisi prius* record, these being costs in the cause. *Lloyd v. The Union Ins. Co.*, 3 *Pug.* 78.

### III.

#### NOTICE OF TAXATION.

**74**———In all cases, between opposing parties, where the proceedings are not by default, there must be notice of taxation of costs, and a judgment signed without notice will be set aside with costs. *Turner v. Crane, East. T.* 1883.

**75—Taxing without notice.**

Taxing costs and signing judgment without notice of taxation to the opposite party, is irregular; but where the attorney had offered to re-tax the costs and deduct any improper charges, an application to set aside the judgment was refused, and an item improperly charged in the costs was ordered to be deducted from the amount to be levied under the execution. *Thomson v. Green*, 6 *All.* 52.

**76**———An attorney having taxed costs and signed judgment without notice to the opposite attorney, contrary to an agreement made by his agent that notice should be given, and which was communicated to him—*Held*, That he was bound by the agreement of his agent, and that the judgment was irregular. *Cormick v. Wilson*, 3 *Kerr* 110.

**77—Good Friday.**

Taxation on that day is not irregular. *Gilmore v. Gilbert*, 2 *All.* 50.

### IV.

#### REVIEW OF TAXATION.

**78—Time.**

Intended motion to review taxation must be given as soon after the taxation as circumstances will permit. *See Doe d. McCallum v. Roe*, 2 *All.* 143.

**79**——Where costs were taxed 29th October, and payment demanded 15th November, an application to review the taxation made without notice, on the first day of the following term was refused, the plaintiff being prepared to move for an attachment for non-payment of costs. *Ibid.*

**80—Waiver.**

The defendant's attorney was served with a copy of a bill of costs, in which neither the names of the witnesses, nor the sum charged for their attendance was stated, but reference was made for those particulars to an affidavit, no copy of which was served with the bill of costs; the defendant's attorney, by his agent, attended the taxation of costs without making any objection to the want of the affidavit. *Held*, That he had thereby waived his right to object, though the affidavit on which the witnesses' expenses were taxed, was afterwards contradicted in several particulars; and therefore, the taxation could not be reviewed. *Chase v. Fawcett*, 1 *All.* 566.

The attendance of some of the witnesses having been denied, the amount charged and not paid by the plaintiff, was ordered to be deducted on a discharge being produced by the defendants, and the plaintiff before issuing execution was required to state on oath what witnesses he had paid. *Ibid.*

**81**——Where a party has attended taxation of costs, after due notice, without making any objection to the witnesses charged for in the bill, he cannot afterwards apply for a review of taxation, on the discovery of facts which he might have known at the time; unless a fraud has been practised upon him, or he has been greatly misled. *Flaglor v. Richards*, 1 *All.* 599.

**82—New Affidavits.**

*Quere*, Whether, on an application for review of taxation, new affidavits are receivable by the Court, or by the clerk, in case a review is ordered. *See Murray v. Williston*, 1 *All.* 492.



**83—Costs on review—Mistake of Clerk.**

The costs of a review of taxation are not allowed where it was occasioned by the mistake of the clerk. *Snodgrass v. Johnston*, 2 All. 200.

**84—Grounds for review—Mistake in entering R<sup>cs</sup>.**

A mistake in entering a rule in the minutes is not a ground for reviewing taxation, it not appearing that the judgment was wrong, or the opposite party misled by it. Where there were mistakes on both sides, an application to set aside the judgment, and review taxation, was granted, without costs. *Crookshank v. McFarlane*, 3 All. 18.

**85—Over-allowance—Witnesses.**

If a clear case of over-allowance for attendance of witnesses is made out, the Court will review taxation. See *Gaudin v. McKilligan*, 2 All. 477.

**86—Different issues.**

If both parties are entitled to tax costs on different issues, an appointment for taxation should be obtained from the clerk. *Crookshank v. McFarlane*, 3 All. 18.

**87—Costs of inferior court.**

If an action is commenced in the Inferior Court, and afterwards removed into this court, the clerk of Supreme Court may tax the costs incurred in the court below, without referring them to the officer of that court. *Milner v. Styles*, 3 Kerr 143.

**88—Making new motion—Withdrawing affidavits.**

If, on an application for an order to review taxation of costs, the affidavits are insufficient, and the party intends making a new motion on additional affidavits, he ought to withdraw the first motion; if judgment is given upon it, he is precluded from making another application.

*Semble*, That notice should be given to the opposite party before applying for a review. *McLaughlan v. Wilson*, 3 Kerr 177.

**89—Equity—Taxation by Judge.**

The taxation of costs by the Clerk in Equity, under the Act 17 Vic. cap. 18, may be reviewed by a Judge of the Court, and the application may be made by motion stating the objections to the taxation.

**Time.**

The application is not too late if made at the next sitting of the Court after the costs are taxed, though they were taxed during the sitting of the Court.

If the clerk, in taxing costs, acts on a wrong principle, the Court will review the taxation. *Hendricks v. Hallet*, 1 *Han.* 170.

**90**——Where plaintiffs were dismissed in consequence of usury, the Court refused to interfere with discretion of Judge of Court in ordering that costs should follow the result of suit. *Jardine v. McWilliams*, 1 *Han.* 579.

**Appeals not generally entertained in questions of costs.**

*See* Supreme Court in Equity.

**91**——Where an appeal from the decision of a Judge in Equity is dismissed with costs, the costs of the appeal are recoverable by attachment and not by execution under the Act 17 Vic. cap. 18. *Smith v. Armstrong*, *Mich. T.*, 1872.

**92—Objections—Specific statement of.**

On an application for review of taxation of costs, the objections should be stated specifically. *Cudlip v. The Rector, &c., St. Martins*, 2 *Pug.* 8.

**93—Insufficient affidavit—Mileage and attendance of witnesses—Costs on application.**

An affidavit of attendance of witnesses, which referred to a schedule annexed, and merely stated that "the annexed list contains a true statement of the names of the witnesses subpoenaed, attending and examined at the trial," was held insufficient, and where the clerk allowed the plain-

tiff on taxation of costs the mileage and attendance on such affidavit, and also the costs of a jury of view on a former trial, which was granted at the plaintiff's expense, the Court ordered a retaxation of costs, and *Held*, That the defendant was entitled to be indemnified for the costs thrown upon him by the plaintiff's act, and therefore ordered the plaintiff to pay costs of the application for review. *Shephard v. Shephard*, 2 *Pug.* 452.

The costs of review of taxation are entirely in the discretion of the Court. *Ibid.*

**94 — Review of taxation — Erroneous statement of facts.**

Where an attorney made an affidavit on the statement of the Master, that certain items had been allowed, and it appeared by the taxed bill that they had been struck off, the rule for review of taxation was discharged with costs. *Doe dem. Johnston v. Jardine*, 2 *Pug.* 7.

**95—Taxation on erroneous affidavits.**

Where a bill of costs has been taxed on erroneous affidavits, the injured party obtaining a review, is entitled to the costs of the application. *Doe dem. Firth v. McLeod*, 2 *Pug.* 1.

**96—Certified deed—Charges for.**

When a party knows where deeds were quite recently, he ought to make sufficient search before making affidavit that he did not know where originals were, and looseness in swearing without sufficient search, discouraged. *Ibid.*

**97—Copies of pleadings.**

When a Solicitor being asked by two Judges to let them see copies of the pleadings in an equity suit, gave the original draft to one Judge, and a fair copy to the other, no order of the Court being made—*Held*, He was not entitled to charge in his bill of costs for copies or service. *Cudlip v. Rector, &c., of St. Martins*, 2 *Pug.* 8.

**98—Smallness of objectionable items.**

When the objectionable items in a bill of costs were very small, the Court refused a rule *nisi* to review the taxation. *Bell v. Moffat*, 2 *P. & B.* 406.

## V.

## PARTICULAR PROCEEDINGS—PARTICULAR PERSONS.

**99—Persons—Executors.**

Executors are liable to costs on a non-suit in an action where *ne unques executor* is pleaded. *Mitchell v. Long*, C. Ms. 76.

**100**——Where an executor declared, upon promises to himself, and upon an account stated with him as executor, as well as upon promises to the testatrix, and was non-suited, the Court allowed the defendant her costs. *Executors of Grosvenor v. Agnew*, Ber. 29.

**101**——An administrator will not be relieved from his liability to the payment of costs under the Act 7 Wm. IV. cap. 14, sec. 23, where he moves, not on matters appearing at the trial, but upon affidavits which are sufficiently answered by the defendant.

*Semble*, The Act extends only to cases in which executors or administrators were before that exempted from the payment of costs. *Thompson v. Allanshaw*, 1 Kerr, 209.

**102—Insolvent debtor—Application.**

Costs will not be given on refusing the first application of an insolvent debtor except in an extreme case; but the rule is otherwise on a second application, where the objections made to the former one are not fully answered. *McFarlane v. Gordon*, 2 All. 162.

**103—Payment of costs—Condition—Second application.**

Where an application to discharge an insolvent debtor was refused with costs, the Court refused to make the payment of the costs a condition precedent to another application. *McFarlane v. Gordon*, 2 All. 201.

**104—Motions—Cognovit—Satisfactory answer.**

Where a motion was made to set aside a *cognovit* for fraud and collusion, and the charge was satisfactorily answered; the Court dismissed the charge with costs, to be paid by applicant, though the matter had not been moved with costs. *Doe v. Crowley*, 3 Kerr 294.

**105—Quashing conviction.**

Court has no power to allow costs on quashing convictions. *Regina v. Stevens*, 8 Kerr 356.

**106—Mesne profits—Costs—Damages.**

As a general rule the plaintiff after judgment against casual ejector is entitled to recover the costs thereof as part of the damages in an action for mesne profits. *See Doe v. Dobson*, 2 All. 446.

**107—Discharging rule—Mandamus.**

No costs are allowed on discharging a rule *nisi* for a mandamus, on account of the affidavit being improperly entitled. *Regina v. Justices of York*, 1 All. 90.

**108**———A rule dischargeable without costs, if moved with costs, will be discharged with costs. *Porter v. Burns*, 1 All. 106.

**109**———If a rule for setting aside proceedings with costs, is discharged on shewing cause, the costs of opposing it do not follow as of course. *Kelly v. Wilson*, 1 All. 199.

**110**———The successful party should apply for costs at the time of discharging the rule. *Ibid.*

**111**———Where a rule *nisi* for a *certiorari* to remove a conviction is discharged, the successful party is not entitled to the costs of opposing the rule. *Ex parte Daley*, 1 All. 435.

**112**———Where a rule was discharged on the authority of a modern English case altering the previous practice, the cause of opposing the rule were refused. *Simonds v. Simonds*, 2 All. 468.

**113 — Vexatious action — Staying proceedings until payment of costs.**

Defendant obtained judgment as in case of a non-suit, because plaintiff did not try his cause pursuant to a peremptory undertaking; plaintiff having brought a second action for the same cause, the Court stayed the proceedings until the costs of the first suit were paid, the defend-

ant's affidavit alleging his belief that the plaintiff was insolvent, and the second action vexatious—though the plaintiff stated he was prevented from trying his first action by the absence of a material witness. (But *See Danvers v. Morgan*, 17 C. B., 530. *Estabrooks v. McKenzie*, C. Ms. 41.

#### **114—New trial.**

Where a new trial is granted, "the costs to abide the event of the suit," and the same party succeeds on the second trial, he is not entitled to the costs of shewing cause against the rule for setting aside the first verdict. *Nice v. Coyle*, Hil. T., 1892.

**115**———If the rule for a new trial is silent as to costs, the successful party on the second trial is not entitled to the costs of setting aside the first verdict. *Weldon v. Weldon*, 3 All. 148.

#### **116—Replevin—Plea—Witnesses—Materiality.**

Where, in replevin, the substantial issue was the right to the property, which was found for the defendant, he is entitled to the costs of the witnesses called to support his plea, though their evidence may not have been exclusively applicable to that issue. *Fearon v. Murray*, 5 All. 173.

#### **117—Mortgagee—Redemption of mortgage.**

As a general rule, a mortgagee is entitled to his costs in a suit for the redemption of his mortgage; but where he had been in possession of the property, and had not kept accurate account of the rents and profits, and claimed a considerably larger amount from the mortgagor than was ultimately found to be due, he was not allowed costs; and as the mortgagor had improperly disputed part of the amount claimed by the mortgagee, he was not allowed costs; each party being ordered to pay his own costs of the suit. *Livingston v. Bank of New Brunswick*, 6 All. 252.

#### **118—Motion for judgment quasi non-suit—Ex parte rule—Affidavit answering.**

Where a motion for judgment as in case of a non-suit was refused, on the ground that the cause had once been

carried down to trial and made a *remanet*, and the defendant's attorney was ordered to pay the costs of resisting the motion, on the ground that the defendant on the record was only the nominal defendant, and that the cause had been settled between the real parties, after the notice of trial, of which the attorney was aware, and he afterwards obtained a rule *ex parte* for costs of the day, for the same default for which the motion for judgment, as in case of a non-suit had been refused, the Court not being aware that it was the same cause. On a motion to set aside this rule, and for the attorney to answer the affidavits, he produced his own and the defendant's affidavits, denying that the defendant was only a nominal defendant, and that any other person had authority to settle the suit, or to control it, the motion to set aside the rule was discharged without costs. *Graham v. Wetmore*. 5 All. 217.

**119—Mortgage—Foreclosure—Plaintiff's right to costs of defending suit for redemption.**

In a suit for foreclosure of a mortgage, by which the mortgagor, in addition to other property conveyed, assigned a mortgage given to him by M., the plaintiff is not entitled to recover the costs incurred by him in defending a suit for redemption brought against him by the assignee of the redemption of M., in which suit each party was ordered to pay his own costs. *Bank N. B. v. Cronk et al.* 1 Han. 228.

**120—Replevin—Several counts.**

Where plaintiff inserted six counts in a declaration in replevin for the same property, no costs were allowed except for one count. *Hanington v. Girourd*, 3 Pug. 151.

**121—Ejectment—Consent rule.**

The table of fees established under the C. L. P. Act, 1873, applies to actions of ejectment and taxable under consent rule. *Doe d. Hartt v. Brayley*, 3 Pug. 468.

**122—Election Petition—Trial.**

The costs of the trial of election petitions should be taxed according to the same principle, as near as can be,

as costs are taxed under the C. L. P. Act, 1873, per Allan, C. J., and Weldon and Fisher, J.J., Wetmore, J. *diss.*, and Duff, J., *dubitante*. *Stevens v. Rogers and Ryan*, 1 P. & B. 54.

Attachment for costs should be granted by Judge. *See* Attachment 29. *See* further Election Law, *Hibert v. Haddington*.

### **123—Arbitration—Counsel Fee.**

*Held*, by Allan, C. J., Fisher and Duff, J. J., That the expenses of counsel attending before an arbitrator must be considered a part of the costs of the reference, and not part of the costs in the cause. *Held*, by Weldon, J., That it is in the discretion of the Judge whether or not to allow a counsel fee to the successful party where a cause is referred to arbitration, and that the Court will not interfere with the exercise of that discretion. *Held*, by Wetmore, J., That when a cause is referred to arbitration, the successful party is entitled to a counsel fee which becomes part of the costs in the cause when the matter is referred. *Milmore v. Freese*, 1 P. & B. 705.

### **124—Cross Demurrers.**

Where there are cross demurrers, each party is entitled to the costs of the demurrer on which he succeeds. *Wheeler, assignee, &c., v. Stewart*, 3 Pug. 399.

### **125—Argument—Hearing—Counsel Fee—Equity Court.**

Where motions are made to the Court on the equity side supported by affidavits, which are merely read by counsel, and there is no opposition to the motion, they cannot be considered either as arguments of special matters, or hearings, within the words of the Act 17 Vic. cap. 18, and in such case the Court has no discretion to tax counsel fees. *Stewart v. Stewart*, 3 Pug. 598.

### **126—Attachment—Application to set aside—Reference by Judge to Court.**

Where an application to set aside an attachment, made to a Judge at Chambers, was by him referred to the Court, which made an order setting aside the attachment with



costs, the successful party was held to be entitled only to the costs of the application to the Court, and not to those incurred on the hearing before the Judge. *Smith v. Burke*, 3 *Pug.* 599.

**127—Remanet—Costs of the day.**

Where a cause was several times entered on the docket at *nisi prius* and made a remanet and again entered for trial at a subsequent circuit, but struck off by reason of the plaintiff not moving for trial, the defendant, on application for costs of the day, including the costs of the previous circuits, was only allowed the costs of the circuit at which the cause was struck off. *Doe d. Sherwood v. Stackhouse*, 2 *Pug.* 298.

**128—Election petition—Counsel Fee—Second fiat—Rule silent as to costs—Sheriff making unauthorized charges—Witnesses fees—Certificate for.**

A Judge may grant a second fiat for a counsel fee if, upon consideration, he thinks the first one granted insufficient. The petitioner opposed a motion to set aside a Judge's order to tax costs of an election petition according to the scale of fees under the Common Law Procedure Act, and the motion was refused. The rule was silent as to costs. *Held*, That the petitioner was not entitled to the costs of opposing the motion. *Held*, (per Allen, C. J., Wetmore and Duff, J. J., Weldon and Fisher, J. J., *dissenting*), That a certificate or order is necessary for the taxation of witnesses' fees on a trial upon an election petition under the Act 32 Vic. cap. 32, sec. 44 (Consol. Stat. cap. 5, sec. 47). *Held*, (per Allen, C. J., Wetmore and Duff, J. J.), where it appears by the sheriff's account that he had made charges not authorized by law, such charges should not be allowed on taxation of costs; but (per Weldon and Fisher, J. J.) that, in the absence of any affidavit impugning the correctness of the sheriff's account, his return is conclusive. *Stevens v. Ryan et al*, 1 *P. & B.* 547.

**129—Costs of the day—When not costs taxable as costs of the cause—Costs in not trying cause pursuant to undertaking—Elisors, resisting appointment of.**

If a rule for judgment as in case of a nonsuit, is dis-

charged, on terms of giving a peremptory undertaking and paying the costs of the day, and the costs are not taxed, but the cause is afterwards tried, and a verdict obtained by the defendant, he cannot tax such costs as a part of the general costs of the cause. A plaintiff having failed to try his cause pursuant to a peremptory undertaking; defendant obtained a rule *nisi* for judgment, which was afterwards discharged by consent, and on the subsequent trial of the cause, the defendant obtained a verdict. *Held*, That he was entitled to recover, as part of the costs in the cause, the costs occasioned by the plaintiff's not trying pursuant to his undertaking; and also the costs occasioned by the cause being made a remanet; but not the costs of resisting an application by the plaintiff to appoint *elisors*. *Styles v. Gilbert*, 5 *All.* 166.

**130.—Dissolving attachment.**

Where attachment is issued under Act 37, cap. 7, (Consol. Stat. cap. 42, sec. 55), and defendant afterwards makes an assignment in insolvency, the attachment will be dissolved without reference to any rights or remedies which plaintiff may have with regard to costs under the Insolvent law. The Court have no discretion in the matter of costs. *Bullock v. Ring*, 3 *Pug.* 252.

**131—Cause entered and standing over—Verdict set aside.**

*Semble*, Whether, when a cause has been entered and stood over for several circuits until a trial is had and verdict obtained which is afterwards set aside, the costs of the previous circuits become costs in the cause. *See Doe d. Johnston v. Jardine*, 2 *Pug.* 7.

**132—Rule for new trial silent as to costs—Subsequent offer to suffer Judgment.**

Where a Rule for a new trial is made, being silent as to costs, and before second trial had, defendant offers to suffer judgment by default under 18 Vic. cap. 9, (Consol. Stat. cap. 37, sec. 127,) and the offer is accepted, plaintiff is not entitled to costs of the first trial. *Ryan v. James*, 2 *Pug.* 219.

**133—Order of Amendment.**

An indulgence granted to the plaintiff should not be granted at the expense of the other party. Where a party in the trial applied for leave to amend his declaration, and the application was granted and the trial put off, the costs abide the suit. *Held*, That such an order was improper, that the costs should be paid by the party getting the amendment. *Smith v. Gerow*, 2 *Pug.* 425.

**134—New enquiry on payment of costs.**

Where the Court grants a rule for a new enquiry of damages on payment of costs, but the plaintiff does not comply with the terms of the rule, and pay the costs, the practice is to grant a rule to discharge the previous rule, unless the costs are paid by a certain time. *McDonald et al v. Cummings*, 2 *Pug.* 378.

**Amendment of plea—Several objections taken by plaintiff, and succeeding on one only—Amendment allowed without payment of costs.**

*See* Pleading II. 51. *Milner v. McKenzie*.

**Costs allowed out of estate—Contestation of will.**

*See* Will. *Re Hazen*.

**Several issues—Plaintiff's right to have finding on—Costs.**

*See* Practice XIV. 17. *Smith v. Isolated Ins. Co.*

**Improper entry of cause—Costs not allowed.**

*See* Judgment as in case of non-suit I. 26.

**As to allowance of costs in actions against Justices of Peace.**

*See* Justice of Peace IV. 13. *Whittier v. Dibble*.

## VI.

## SEVERAL DEFENDANTS—SEVERAL ISSUES.

**135—Several defendants—Acquittal.**

Where four defendants, sued in trespass, entered a joint defence, in which issues were joined in fact and in law, the

plaintiff obtained a verdict against one, but the other three were acquitted on the trial, and judgment was given for all the defendants on the issues in law, which did not go to the whole cause of action; after the lapse of more than one year from entering up the judgment, the defendant's agent having attended the taxation of the plaintiff's costs, and made objections without making any claim of costs, and soon afterward the defendant against whom the verdict was found voluntarily paid to the plaintiff the damages and costs; and it not appearing in this application that the defendants who were acquitted incurred any costs, or that the other defendant had incurred any further costs in the joint defence than if he had been sole defendant. *Held*, That it would require a strong and clear case to authorize the Court to interfere at such a distance of time. *Held*, also, That the issues in law not going to the whole cause of action, the defendants were not entitled to costs under the 7 Wm. IV. cap. 14, sec. 26. *McLaughlan v. Wilson*, 3 *Kerr* 105.

### **136—Allocatur.**

By the Ordinance an allocatur is allowed to an acquitted defendant entitled to the judgment for his costs under 7 Wm. IV. cap. 14, sec. 24. *Kileen v. Burke*, 3 *Kerr* 419.

### **137—Entry of judgment.**

Where, in an action of trespass against four defendants the plaintiff obtains a verdict against one upon which judgment is entered, and the other three are acquitted, the acquitted defendants cannot enter up a separate judgment for their costs, but the award of costs should be entered on the plaintiff's judgment roll—same rule as to demurrer. *McLaughlan v. Wilson*, 2 *Kerr* 626. .

### **138—Several issues—Different findings.**

In replevin, the defendant pleaded *non cepit*, and property in himself; a verdict was found for the defendant on the first issue, and for the plaintiff on the other. *Held*, 1st. That as the plea of *non cepit* went to the whole cause

of action, the defendant was entitled to the general costs of the cause, but not to the costs of any evidence except such as was provided to support that issue. 2nd. That the plaintiff was entitled to the costs of the other issue, and to have them deducted from the defendant's costs. *Holderness v. McKendrick*, 2 All. 213.

It must clearly appear that witnesses whose expenses are claimed, were necessary to support the issues found for the party claiming. *Ibid.*

**139**——Where on an issue on a plea of property in replevin, the jury find the property in part of the goods to be in the plaintiff, and the remainder in the defendant, the plaintiff is entitled to the costs of all the pleadings; but each party is entitled to the costs of the evidence arising on that part of the plea which is found for him. *Read v. Botsford*, 4 All. 476.

Separate executions may be awarded; or the Court may order the costs of one party to be deducted from those of the other, and execution to issue for the balance. *Ibid.*

If, in such a case, the plaintiff neglects to enter up judgment within a certain time, the defendant will be entitled to the *postea*. *Ibid.*

**140—Several counts.**

If the plaintiff obtains a verdict on one of several counts, and there is no finding on the other counts, he is only entitled to costs on that count on which he obtains judgment. *Walsh v. Fairweather*, 2 All. 423.

**Taxation of costs on different issues.**

*See Costs 86.*

**141—Nolle prosequi.**

Where plaintiff enters a *nolle prosequi* to one count of a declaration, the defendant cannot enter up judgment for his costs till the other counts are disposed of. *Allison v. Smith*, 4 All. 238.

**Entry on judgment roll—Application—Lateness.**

*See Ibid.*, 3 Kerr 105.

## VII.

## SECURITY FOR COSTS.

1 ————A demand of particulars is not such a step in the cause as to require the defendant to shew that at the time of making the demand, he did not know of the plaintiff's residence abroad. *Johnson v. Glasier, Hil. T., 1828.*

2 ————A company incorporated in Canada, and having no property in this Province, required to give security for costs. Where security was demanded before pleading, and refused, defendant was allowed to apply, and obtain security at the next term, though he had pleaded in the meantime. *Quebec and Halifax Steam Navigation Co. v. Williston, Mich. T., 1834.*

3 ————A demand for security of cost sent by post, held sufficient. *Abbot v. Ledden, Bert. 38.*

4 ————Defendant must apply promptly after knowledge of the plaintiff's absence; and if he allows a term to pass without applying, after he knows of the absence, security for costs will not be granted. *Gibbs. v. De Veber, Ber. 78.*

5 ————Security for costs, without stay of proceedings, ordered by the Court after plea, and notice of trial, though the defendant might have applied sooner to a Judge at Chambers: the practise of making such applications at Chambers not being of long continuance in the Province. *Vance v. Campbell, 1 Kerr, 168.*

6 ————Where an application to a Judge at Chambers for security of costs has failed on the merits, a new application may be made to the Court on amended affidavits. *Foster v. Amiraux, 2 All. 541.*

## VIII.

## DOUBLE COSTS.

If judgment is affirmed after error assigned, the defendant in error is entitled to double costs under the Stat. 13 Car. 2, cap. 2, sec. 10. *Quære*, Whether the defendant is entitled to such costs where the writ of error is *non prossed*. *Gilbert v. Sayre, 2 All. 512.*

## IX.

**1—Offer filed under Act 18 Vic. cap. 9, to suffer judgment by default.**

Where the defendant, before pleading, filed an offer under the Act 18 Vic. cap. 9, to suffer judgment by default for \$250, which the plaintiff refused, and the defendant then pleaded and gave notice of set-off, and the plaintiff recovered a verdict for less than the sum offered, (defendant's set-off being allowed). *Held*, That the offer must be taken with reference to the state of the pleadings at the time, and not having been renewed after the notice of set-off, that the plaintiff was entitled to full costs, and not merely to the costs up to the time of the offer. *Miller v. Lakeman*, 6 All. 510.

**2**——Where a defendant after giving notice and particulars of set-off, files an offer to confess judgment under the Act 18 Vic. cap. 9, without withdrawing the set-off or giving notice that the offer is made without reference to it, it is *prima facie*, an admission that the sum offered is the balance due after giving the defendant credit for his set-off.

In such a case, a plaintiff whose claim by his particulars exceeds £20, does not, by accepting an offer for less than that sum deprive himself of full costs by the Act 12 Vic. cap. 40. *Turner v. Hamilton*. 6 All. 156.

**3**——Defendant, in trover, about a month after the conversion, offered to confess a judgment under the Act 18 Vic. cap. 9, for \$18, which the plaintiff refused. On the trial (upwards of two years afterwards,) plaintiff recovered a verdict of \$19,—a part, \$15 30, being found by the jury as the value of the goods, and the balance as damages in the nature of interest since the conversion. *Held*, That as the amount tendered was more than the value of the goods and damages up to that time, the plaintiff was only entitled to costs up to the time of the offer, and that the defendant was entitled to the subsequent costs. *Belyea v. Stephenson*, Mich. T. 1866.

## X.

## MISCELLANEOUS.

**Bail—Staying Proceedings.**

*See* Bail 10.

**Cognovit.**

*See* Cognovit.

**Consent rule.**

*See* Amendment III. 7.

**Corporation—Summary Proceedings.**

*See* Corporation I.

**Corporation not liable to attachment for non-payment of Costs.**

*See* Attachment 1.

**Certificate of Judge for full Costs.**

*See* Judge (Certificate of Judge).

**Jury Challenge—Lateness of objection—Costs of day not allowed.**

*See* *Oulton v. Morse*, 2 Kerr 77.

**Refusal to pay Costs.**

*See* Attachment 11.

**New Trial.**

*See* Costs 51, 114, 115.

Practice VIII. 9.

**Award—Setting aside.**

*See* Arbitration.

**Verdict—Setting aside—Costs to abide the event of suit where affidavits did not clearly state that defendant had no knowledge of suit pending.**

*See* *Cameron v. Connell*, 2 All. 398.

**Conviction.**

*See* Justice of the Peace VII.



**Witnesses attendance—Affidavit of.**

*See* Affidavit IV.

**Interlocutory Proceedings, Costs generally in discretion of Court.**

*See* Supreme Court in Equity 3.

Appeals not generally entertained in questions of costs.  
*Ibid.*

**Ejectment—Improperly obtaining Rule to defend—Costs allowed Lessor.**

*See* *Doe v. Fen*, 1 *All.* 683.

**Attorney—Right to receive Costs of judgment assigned.**

*See* Attorney III.

**Right to taxable charges between Attorney and Client.**

*See* Attorney III.

**Counsel Fees.**

*See* Attorney III.

**Inferior Court—Mandamus refused to compel Court to award costs.**

*See* Mandamus 8.

**Judge's Certificate for costs cannot be made a Rule of Court.**

*See* *Horner v. Crookshank*, 4 *All.* 375.

**Arbitrators power to award costs.**

*See* Arbitration.

**Bill of Costs—Delivery of—Action on.**

*See* Attorney VIII.

*Nolle Prosequi*—Where plaintiff enters a *nolle prosequi* to one count of declaration defendant cannot enter judgment for costs until other counts are disposed of. *See* *Allison v. Smith*, 4 *All.* 238.

Motion for judgment, as in case of non-suit and for costs of day at same time for same default, latter motion discharged, with costs. *See* *Stevens v. Hamilton*, 1 *Han.* 335.

**No jurisdiction.**

If an order for review is made by a Judge in a case where he has no jurisdiction, the Court has no power to give costs to the party opposing the order. *Bustin v. Howell*, 1 All. 596. (See No. 60.)

**Challenge to array.**

Where the defendant challenges the array on the ground of affinity between himself and the Sheriff, and the challenge is sustained, the defendant is entitled to the costs of the day as a general rule. See *Sirois v. Hammond*, 1 Han. 332.

**Inquiry—Attendance—No sufficient notice of countermand—Costs allowed.**

See Practice IX. 10, 11.

New trial granted on payment of costs where the costs have been taxed and demanded of the attorney who obtained the rule, who was informed that unless the costs were paid an application would be made to discharge the rule; the Court granted a rule for that purpose absolute, unless the costs were paid in ten days after service. See *Scribner v. McLaughlin*, 1 All. 440.

**Penalty—By-law—Fredericton.**

Costs cannot be given for breach of by-law: the word "costs" in 81st section means costs of distress and sale. See *Ex parte Mowry*, 3 All. 276.

Conviction sustained for penalty. *Ibid.*

**Application discharged—Reasonable grounds for making—Costs refused to plaintiff.**

See *Hardy v. Prince*, 3 All. 264.

**Attorney-General—Retaining Fee—Costs.**

See Attorney-General.

**Execution for, in lieu of attachment.**

See Attachment. *Cotton v. Stack.*

**Review from Justice's Court.**

See Review. *Welling ex parte.*

**Power of Supreme Court over costs taxed by Judge of County Court on a review—*Quere*.**

*See Review. Welling ex parte.*

**Rule to enter cause.**

*See Entry of Cause. Oulton v. Milner.*

**Estate—Contestation of will.**

*See Will. In re Hasen.*

**Costs against Justices of the Peace.**

*Quere*, Whether the Dominion Act 32 and 33 Vic. cap. 29, sec. 134, relating to costs in actions against Justices of the Peace is not *ultra vires*, the Federal Parliament. *Whit-  
tier v. Debble*, 2 *Pug.* 243.

**Inquiry—Proceedings taken through mistake of sheriff  
—No costs allowed.**

*See Hanington v. Cormier*, 2 *Pug.* 450.

**Attachment will be granted by Court for non-pay-  
ment of costs.**

*See Attachment 52. Bishop v. Meehan.*

**Damages—Costs of action.**

*See Damages l. 34. Deveber v. Roup.*

**Justice of Peace—Power to award costs on dismissal  
of information.**

*See Justice of Peace VII. 6.*

**COUNCILLORS.**

**Nomination of.**

*See Election.*

**COURTS.**

*See Admiralty—City Court.*

County Court—Exchequer.

Portland, (Town of.)

Inferior Courts—Justice of the Peace.

Probate Court.

Supreme Court of Judicature.

Supreme Court in Equity.

Surrogate.

Matrimonial Causes.

**COUNSEL.****Addressing Jury—Admissions by—Examination of—Fees.**

See Attorney X.  
Evidence I.

**COUNTY COURT.****1—Jurisdiction — Necessary that proceedings should be first certified.**

The Supreme Court has no jurisdiction over a cause in the County Court until the Judge has certified a copy of the proceedings, as directed by Acts 30 Vic. cap. 10, sec. 24, and 33 Vic. cap. 20, sec. 4; therefore, a party who has recovered a judgment in the County Court, against which proceedings for appeal had been taken, and notice of appeal given, but the proceedings had not been certified by the Judge, is not entitled to the costs of appearing to answer the appeal. *Ryan v. James, Mich. T., 1870.*

**2—Illegible certificate of proceedings.**

Where the proceedings, certified by the Judge of County Court, on an appeal were generally illegible, the Court refused to hear the argument. *Dibblee v. Wood, 1 Pug. 137.*

**3 Death of Judge after granting rule nisi—Proceedings.**

Where the Judge of the County Court died after granting a rule *nisi* for a new trial on the ground of misdirection, but no minute of his direction to the Jury could be found. *Held*, That his successor might receive affidavits to shew what the direction was, in order to determine the application for a new trial. *Kinnear v. Calhoun, Mich. T., 1871.*

**4—Jurisdiction—Off-set—Recalling evidence.**

Where the plaintiff proved goods sold and delivered to the defendant, beyond the amount recoverable in the County Court, and also admitted the receipt of goods from and work done by the defendant, which, if deducted from the plaintiff's account, would have brought the amount within this jurisdiction; but omitted to prove any agreement that such

goods and work were to be taken as payment, whereupon the defendant moved for a non-suit. *Held*, That it was discretionary with the Judge to allow the plaintiff to be recalled to prove that there was such an agreement. *Simpson v. Glass*, 1 *Pug.* 99.

**5—Judge refusing to hear motion—Jurisdiction.**

Where the Judge of the County Court refused a non-suit moved for on the ground that the case was beyond the jurisdiction of the Court, and the defendant moved for a new trial on the same ground before the successor of the Judge (who had died,) and he, being of opinion that the Court had no jurisdiction, and that he had consequently no power to grant a new trial, declined to make any order. *Held*, That he should have ordered a non-suit to be entered ; and the cause was remitted to the County Court for that purpose. *Boltenhouse v. Black*, *East. T.*, 1872.

**Action brought in Supreme Court—Title to land involved—Costs allowed.**

*See* Costs, 10, 11, 12.

**6—Insolvent Act of 1869—Judge proper party to hear petition—Of what county.**

The County Court Judge of the county in which the demand on the debtor to assign is made, is the proper party to hear the petition, although the debtor may reside and do business in another county. *Ex parte Thomas*, 2 *Han.* 168.

**7—Taking examination of debtor—County.**

A Judge of the County Court may examine and make his order for the support or discharge of any debtor, in any county within his district, even if the debtor has been arrested and is in gaol, or on the limits in another county in his district. *Ex parte Jardine*, 1 *Han.* 572.

**8—Sureties on limit bond—Render.**

Judge may make order for render of principal ; “ *Bail* ” in Act 12, cap. 39, sec. 14, includes sureties on limit bond. *See* Bail 18.

**9—Right to stay proceedings—City Court—Interlocutory order—Appeal.**

The County Courts and the City Court of St. John, being both courts of limited jurisdiction, and, in suits for the recovery of debts, of concurrent jurisdiction; a Judge of the County Court has no power to stay the proceedings in a suit brought to recover a debt in that court, on payment of the debt without costs, on the ground that the suit might have been brought in the City Court, where the costs are less than in the County Court. *Hanington v. Stewart, Hil. T., 1873.*

*Quere*, Whether there is any appeal to the Supreme Court under the Act 30 Vic. cap. 10, from an interlocutory order of a Judge of the County Court. But an order absolutely to stay the proceedings in a suit is a final decision, and may be appealed from. *Ibid.*

**10—Acts relating to Grand and Petit Jurors in criminal matters.**

The Acts relating to the attendance of Grand and Petit Jurors at the County Courts are within the powers of the Local Legislature, under "The British North America Act, 1867," sec. 92, as pertaining to the "Administration of Justice," and the "Constitution and organization of Provincial Courts," and do not belong to the Parliament of Canada under sec. 91, as "Procedure in Criminal Matters." *Regina v. Foley, East. T., 1873.*

**11—Judge making ex parte order for new trial.**

In an action in the County Court, the Jury having found a verdict for the defendant, contrary to the Judge's direction, he made an *ex parte* order for a new trial. On appeal, the order was reversed, and the case sent back to the County Court, with directions to issue an order calling on the defendant to shew cause why a new trial should not be granted. *Commercial Bank v. Price, 1 Pug. 97.*

**12—Appearance to writ.**

Where a statute provides for service of a writ on defendant, and that he shall appear within a certain number

of days thereafter, the time begins to run on the day after the day of service. Therefore, a defendant in an action in the County Court has thirty days to appear, exclusive of the day of service. *Currey v. Lawson*, 3 Pug. 233.

### **13—Issue of Summons—Different county.**

The Judge of the County Court of St. John and Kings. was called in by the Judge of the Albert County Court, to try this case under the County Courts Act, and issued a summons for a new trial while sitting at his chambers in St. John, but afterwards discharged it on the ground that he had no power to act in St. John. *Held*, That he had power to issue a new summons in Albert, the first being a nullity. *Steeves v. Lucas*, 2 Pug. 70.

(See now, Consol. Stat. cap. 51 sec. 54, allowing Judge to transact business at Chambers of his County for other County.)

### **14—Insolvent Act of 1869—Order of Judge**

A County Court Judge acting under the Insolvent Act of 1869, having made an order that defendant, the assignee of the estate of H. L., pay to plaintiff, assignee of the estate of A. L., the proceeds of the sale of a lease which A. L. had assigned to H. L., and which defendant contended was void. *Held*, That the Judge had power under the 50th section of the Act to make such order, and that it was not necessary to decide whether the Act gave him power to order the assignment to be set aside. *Held*, also, That an appeal lay from such order to the Supreme Court. *Skinner, assignee, &c. v. McLeod*, 2 Pug. 131.

### **15—Power of Judge to grant relief to bail.**

A County Court Judge sitting at Chambers, has the same power to grant relief to bail to the limits, as the Supreme Court. *Merritt, Assignee, &c. v. Clancey*, 2 Pug. 476.

### **16—Land—Questions relating to.**

There are many cases in the County Courts in which questions of the title to land must incidentally arise, but title to land may not be in question. *Fowler v. Fowler*, 2 Pug. 488.

**Appeals from County Court.**

*See Appeal.*

**Power of Judge in garnishee process.**

*See Garnishee Process.*

**No power in Judge to make order for \$600 under Homestead Act.**

*See Insolvent Act, Re Harrison.*

**COUNTY COURT JUDGE.**

*See County Court.*

**COUNTERMAND.****Notice of—Time when given to save costs.**

*See General Rules 77.*

**Notice of inquiry to save costs—Insufficiency of.**

*See Practice IX. 10, 11.*

**COVENANT.****1—Construction—Mutual and Independent.**

The defendant covenanted with the plaintiff to teach him the trade of a blacksmith, and the plaintiff covenanted to serve the defendant faithfully for five years, and not to absent himself from the defendant's service without leave. *Held*, That these covenants were mutual and independent, and that the non-performance by the plaintiff was no defence to an action against the defendant for breach of his covenant. *Hunter v. Gifford*, 1 All. 701.

**2—Breach of.**

A covenant "to keep up" a mill dam is broken by allowing it to remain out of repair after notice. *Leonard v. Young*, 4 All. 111.

**3—**——To keep dam in repair, is a covenant running with the land. *See Infra 10. Philps v. St. John Water Co.*

**4—Assignee of—Privity of Estate.—Conveyance.**

Where the assignee of a covenant running with the land, had parted with his estate therein previous to bringing the action. *Held*, That he had parted with his action also. *Wallace v. Vernon*, 1 Kerr 5.



### **5—Action—Lessor against lessee—Reversion parted with—Rent.**

An action of covenant for non-payment of rent does not lie by the lessor against the lessee, where the lessor has parted with his reversion in part of the property, since the lease; the rent being entire and not apportionable. *Rector, &c., of Sackville v. Bacon*, 6 *All.* 134.

### **Particular Covenants—Assignee of Term—Improvements.**

*See* Landlord and Tenant VI. 2.

### **6—For quiet enjoyment—Dam overflowing.**

The defendant by deed, containing the words "grant, bargain and sell," conveyed to the plaintiff a mill and mill privilege, and afterwards erected a dam on his own land further down the stream, by which the plaintiff's land was overflowed, and his mill prevented from working. *Held*, That this was a breach of the covenant for quiet enjoyment given by the Act 10 Vic. cap. 42. *Wells v. Trenholm*, 2 *All.* 871.

### **7—Against Erections—Assignee—Estoppel.**

Plaintiffs being owners of land below low-water mark in the harbour of St. John, granted to H., the owner of a lot fronting thereon, the right to extend below low-water mark, a wharf built upon his lot, and H. covenanted for himself, his heirs and assigns, that he would not erect any buildings on the wharf so to be built. H. afterwards extended his wharf beyond low-water mark and assigned to the defendant, who erected buildings on the wharf. Low-water mark had receded to the outer-end of the wharf since the grant was made. *Held*, That the covenant bound the assignee, and that he was estopped from denying that the wharf was built and occupied subject to the conditions of the grant, and from claiming a right to build, as owner of the land by accretion. *Mayor, &c., of St. John v. Smith*, 3 *All.* 103.

### **8—Lessee—Rights—Renewal of lease—Appraisement—Payment for improvements—Enforcing valid covenants.**

A lease by a Church Corporation created by Act of As-

sembly 29 Geo. III., cap. 1, contained a covenant, that, if at the expiration of the term, the lessee should desire a new lease for twenty-one years he should be entitled to the preference; and in case he should refuse to take such new lease on the terms required by the lessor, that the buildings then on the demised premises, erected by the lessee, should be appraised, and that the lessor *first paying to the lessee the amount of such appraisement*, should be entitled to enter upon the premises and have the improvements: and in case the lessor should not consider it expedient to pay the amount of the appraisement, that then the lessee should be entitled to receive "a new lease of the premises for a further term of twenty-one years *upon the same terms and conditions of this present lease.*" *Held*, on renewal of the lease, that the lessee was entitled to the same covenants for payment for improvements and for delivering up possession on receiving such payment, as were contained in the former lease. *Bedell v. Rector, &c., of Christ's Church, Fredericton*, 3 All. 217.

*Quere*, Whether by the words "first paying," etc. in the covenant, the lessor's right of re-entry at the end of the term, was suspended until the value of the buildings was paid to the lessee; or whether the lessor would only be liable on the covenant if he re-entered without payment. *Ibid.*

A covenant to do one of two things at the option of the covenantor, one of which is lawful and the other not, may be enforced as to that which is lawful. Thus a covenant in a lease by a church corporation to pay the lessee for the buildings on the land at the end of the term, or grant him a new lease for a further term of twenty-one years on the same terms and conditions as the former lease, may be enforced so far as relates to the payment of the buildings, though that part which relates to the renewal may be void under the Stat. 13 Eliz. cap. 10. *Ib.*

*Quere*, Whether the Statute 13 Eliz. cap. 10, applies to Church Corporations in this Province. *Ibid.*

**9—Good title—Existing lease—Surrender.**

The defendant demised land to M. for a term of years, by lease under seal, and afterwards with the consent of M., conveyed the same land, with an adjoining piece, to the plaintiff in fee, and covenanted that it was free from encumbrances. M. remained in possession of the land after the conveyance, but paid no rent. *Held*, That this did not amount to a surrender of the lease by operation of the law, and therefore that there was a breach of the covenant. *Babbit v. Cowperthwaite*, 3 All. 254.

The mere consent of the lessee to a conveyance by the owner of the land, of his interest in the reversion, will not constitute a surrender of the lease by the operation of law. He must be a party to some act done, the validity of which he is estopped from disputing, and which would not be valid if the lease had continued to exist. *Ibid*.

**10—To keep dam in repair—Construction.**

Defendants being the owners of land through which a stream of water flowed, and across which they had built a dam connecting with a natural bank or point of land which formed part of the dam, leased the land adjoining below the dam to the plaintiffs and P., (who afterwards assigned to the plaintiffs, and their assigns, and covenanted to maintain and keep the dam in good repair at all times during the term: proviso, that if the supply of water should be cut off by the destruction or injury of the dam, the rent should be suspended. The bank was broken by an extraordinary flood, which overflowed and injured the plaintiff's property. *Held*, 1st. That the covenant to repair only extended to the artificial dam built by the defendants, and not to the natural bank. 2nd. That even if it did extend to the natural bank, the accident was no breach of the covenant, if the defendants repaired the dam within a reasonable time. 3rd. That even if there was a breach of the covenant, the plaintiffs were not entitled to recover for the destruction of their property and suspension of their business, as damages resulting from such breach. *Philps v. The St. John Water Company*, 4 All. 24.

The covenant to keep the dam in repair is a covenant running with the land ; and *Seemle*, That the damages recoverable for breach of such a covenant, are confined to those sustained by the covenantee or his assigns, from the privation of the proper use of the demised premises by the default of the covenantor. *Ibid*.

*Seemle*, That if the injury to the plaintiffs' property was caused by the negligence of the defendants in not keeping the dam in repair, the plaintiffs might recover the consequential damages in an action on the case. *Ibid*.

#### **11—For title to land—Eviction.**

The defendant conveyed land to A. in 1844, and covenanted that he had full power and authority to sell ; A. put a tenant in possession, who gave up the property to B., who claimed title to it as heir to his father. B.'s father took possession of the land in 1814, and died seized in 1824, leaving a widow, who a few years after conveyed her right and gave up possession to a person under whom the defendant claimed. *Held*, 1. That B. had a good title against every one but the original grantee, and therefore had a right to enter and evict A. 2. That B.'s entry having been made under his own title, and not under that of A.'s tenant, it amounted to an eviction, and that A. was not bound before bringing an action on the covenant, to resume possession of the land, or to give notice to the defendant of B.'s claim. *Beek v. Barlow*, 1 *All.* 465.

#### **12—Breach—Pleading—Judgment non obstante veredicto—Right of immediate action.**

To an action of covenant upon the words " grant, bargain and sell," in a conveyance of land, assigning as a breach the existence of a prior mortgage, the defendant pleaded that the mortgage was recorded in the public records, and that the plaintiff received the deed subject to such mortgage : an issue thereon having been found for the defendant, judgment was given for the plaintiff, *non obstante veredicto*, the plea being no answer to the action. The covenant is broken immediately, and the plaintiff need not wait until he is evicted before bringing his action. *Good v. End*, 1 *All.* 603.

**13 — Breach in lifetime of covenantee — Action—By whom—Heir—Executor.**

If a covenant for title is broken in the lifetime of the covenantee, no estate descends to the heir, and an action for the breach is properly brought by the executor. *Beek v. Barlow*, 1 *All.* 465.

**14**——Where the breach of covenant for title, and the damage arising therefrom, both occurred in the lifetime of the testator, the action for such breach should be brought by the executor. *Cunningham v. Scoullar*, 4 *All.* 385.

**15—Policy of insurance — Endorsement — Not under seal—Covenant not maintainable.**

A policy of insurance on goods against loss by fire was effected in the name of G. F. & Co.: the plaintiff H. F. having afterwards become the owner of the goods, the agent of the company made and signed the following endorsement on the policy: "This insurance is hereby continued in the name of H. F." *Held*, (assuming that the agent had power so to continue the assurance for the benefit of the plaintiff,) That the endorsement not being under the seal of the company, the plaintiff could not maintain covenant on the policy. *Frost v. Liverpool, London and Globe Insurance Co., Hil. T.*, 1871.

**16—Covenant to renew—Specific performance—Covenant running with the land.**

A. leased land to B. for twenty-one years, with a covenant for himself, his heirs, and assigns, that at the expiration of the lease, the buildings on the demised premises should be valued by disinterested persons, and A., his heirs, or assigns, would then either pay for them at such valuation, or continue the lease to a further term at the same annual rent, at the option of A., his heirs or assigns. After the expiration of the lease, B. continued in possession without any new agreement, and paid the ground rent to A. up to the time of his death, a year and eight months after the expiration of the term; and during part of this time, A., as a commissioner of police, leased a part of the premises from B., and paid rent to him. After

A.'s death, the defendant, who was his devisee, negotiated with the plaintiff (the assignee of the lease), respecting a renewal, but nothing was agreed upon, and the defendant finally leased the land to a third person, whereupon the plaintiff filed a bill for the specific performance of the covenant to renew, and to restrain the defendant from leasing the property. *Held*, 1. That A.'s covenant was not a mere personal or collateral covenant; but related to and ran with the land, and bound A.'s assignee. 2. That it was A.'s duty, on the expiration of the lease, to exercise his option of renewing, or paying for the buildings; and that, by his acts, he had shewn his intention to continue the lease. 3. That a Court of Equity had jurisdiction to decree specific performance of the covenant to renew. 4. That the covenant to renew for a "further term" meant a term of 21 years. The bill prayed specific performance of an agreement to renew, made between the plaintiff and defendant, after the expiration of the lease. *Held*, That though this agreement could not be enforced, either because it was not proved, or because it was not in writing, the plaintiff was, nevertheless, entitled, under the Act 17 Vic. cap. 18, sec. 4, to specific performance of the covenant to renew. *Irvin v. Simonds et al*, 6 All. 190.

**17—Pleading—Proviso—Necessity of setting out same in declaration—Covenant not to sell—Breach.**

Where the promise or covenant contains an exception or proviso qualifying the defendant's liability, the declaration must state the exception or proviso, and it will be wrong to state the contract as an absolute one; but if the covenant or clause in an agreement is absolute in itself, without any exception or proviso, or any reference to any, it may be declared on as an absolute contract, although, in a distinct part of the deed or instrument, there is a proviso defeating or qualifying it under certain circumstances, such a proviso being in the nature of a defeasance, and to be set up on the other side. *Hall v. Allan*, 2 Pug.

A covenant, not directly or indirectly to sell machines in certain counties, is not broken by an omission on the

covenanter's part, in selling the machines where he had a right to sell them, to stipulate that the purchasers should not re-sell in any of the counties where the covenantee had the exclusive right of sale. There might be a breach of the covenant, if it were shewn that the covenanter knew, when he sold the machines, that the intention of the purchaser was to re-sell them in a county where the covenanter had no right to sell. *Ibid.*

#### **18—Ancestor and heir—Appraisement.**

Where the terms of a covenant specially provide for its performance by the heir, it is sufficient to bind the latter, though the ancestor may not covenant in the usual form "for himself, his heirs, &c." Therefore, where a lease under seal contained the following covenant—"And it is hereby mutually covenanted by and between the parties to these presents, that at the end of the term all buildings then on the premises shall be valued and appraised by two persons, one to be chosen by G. P., (the lessor,) his heirs, &c., the other by J. M., (the lessee,) his executors, &c., and it shall then be at the option and election of the said G. P., his heirs, &c., to pay such appraised value or renew the lease." This was held sufficient to bind the heir of the lessor. In an action brought for breach of such a covenant, it is necessary to allege a request and refusal to appoint an appraisor, and this is the case, even though the lessor was only a tenant for life and died before the expiration of the term, and the lessee was evicted by the remainder-man. In such a case the heir is bound by the covenant of his ancestor, even though by the latter's death the lease became void as to the term demised.

*Quære*, Whether, where the heir is an infant, a request made upon him to appoint an appraisor is sufficient. *Woods v. Peters*, 2 *Pug.* 478.

#### **Provisos or exceptions—Declaration—Nonfeasance.**

See Pleading I. *Hall v. Allen, et al.*

#### **Assignment of lease against lessor—Privity of estate Possessory estate.**

See Assignment 3.

**Property taken subject to covenant.**

*See* Equity 4.

**CREDIBILITY.**

*See* Witness.

**CREDIT.****Repairs of Ship—Agent.**

*See* Assumpsit 45.

**Unexpired Credit.**

*See* Action at Law VII. 2.

**Privity—Personal Responsibility.**

*See* New Trial II. 22.

**Salary of Preacher—Committee.**

The plaintiff was engaged at a certain salary as a preacher at a meeting of the members of the church to which he belonged, and where a committee was appointed to collect subscriptions to pay his salary. The defendants were deacons of the church present at the meeting, and there was conflicting evidence whether they were the committee and whether they had made themselves liable to the plaintiff. *Held*, That it was properly left to the jury whether the plaintiff had engaged on the personal responsibility of the defendants, or whether he depended upon the voluntary subscriptions of the church.

*Quere.* Whether the mere nomination of a party on a committee renders him liable on contracts entered into by the other members, unless he has taken some part in the proceedings. *Lawton v. Wilder*, 2 *All.* 416.

**Intoxicating Liquors.**

The prohibition in the Act 17 Vic. cap. 15, sec. 13, against selling liquors on credit only applies to inn-keepers and tavern-keepers. *See McAuley v. Lawlor*, 4 *All.* 600.

**Inquiry—Judgment by Default—Evidence.**

After judgment by default on common counts, defendant, on execution of writ of inquiry, may shew that he contracted merely as agent of third person to whom credit was given. *See Fauls v. Sargent*, 3 *Kerr* 248.



**Contract—Whether with Firm or personal member of.**

*See Contract 15.*

**Insurance Broker—Credit to—Agent.**

*See Principal and Agent 1, 2.*

**Work and Labour—Agreement to Credit towards Rent.**

*See Assumpsit III. 40.*

**Entry on books—Credit.**

*See New Trial II. 45. Raymond v. Cumming.*

**Public Agent.**

L. was a road-master, and employed C. to do certain work on a public road, the agreement between them being that the work was to be paid for when L. collected the road moneys. L. went out of office before he collected the moneys, and in an action brought by C. against L. the court held that the credit was given to the fund and not to the personal liability of the road-master. *Regina v. Topley*, 8 *Pug.* 47.

*See also Clarke v. Toke*, 2 *Pug.* 380.

**CREDITOR.**

*See Insolvent Act of 1869.*

**Judgment Creditor—Remedy at Law before—Application in Equity.**

*See Equity 6.*

**CRIMINAL LAW.****I. PROCEDURE AND PRACTICE.****II. INDICTMENT.**

Prosecutor.

Allegations.

Stealing.

Place.

Smuggling.

Copies of Indictment.

Embezzlement.

Different Counts—Separate Offences.

Fraudulent Appropriation.

Death—Cause of.

Feloniously Striking.

Resisting Constable.

Regulations—Breach—Misdemeanour.

Forgery—Perjury.

III. EVIDENCE.

IV. MISCELLANEOUS.

### Summary Conviction.

See Justice of the Peace IV.

### I.

#### PROCEDURE AND PRACTICE.

#### 1—Revenue Act—Operation.

The Revenue Act 15 Vic. cap. 28, sec. 68, enacted that any penalty or forfeiture inflicted under that Act should be recovered by action of debt or information; section 72 enacted that if any person should assault any revenue officer in the exercise of his office, he should, on conviction, pay a fine not exceeding £100, nor less than £50, which fine should be paid to the Provincial Treasurer; and in case of non-payment, the offender should be imprisoned for a term not exceeding twelve months, nor less than three months, at the discretion of the Court. *Held*, That the Act only limited the discretion of the Court as to the amount of fine and imprisonment on conviction for an assault under section 72, but did not alter the ordinary mode of proceeding by indictment. *Reg. v. Walsh*, 3 All. 54.

#### 2—Alteration by Statute—Effect of.

An offence committed before, though tried after the Revised Statutes came in force, is not indictable under those Statutes, though the words creating the offence are not altered thereby. *Reg. v. McLaughlan*, 3 All. 159.

The forms of indictment in the Schedule to Title XL. of the Revised Statutes are inapplicable to offences not referred to in that title. *Reg. v. McLaughlan*, 3 All. 159.

**3—Necessary Allegation—Grievous Bodily Harm.**

An indictment under the Act 12 Vic. cap. 29, for causing grievous bodily harm, must allege the offence to have been committed "maliciously" in the words of the Act. It is not included in the word "feloniously." *Reg. v. Jope*, 3 All. 161.

**4—Adjournment of Court.**

Where a Circuit Court is adjourned to a future day, in consequence of unfinished civil business, the criminal jurisdiction of the adjourned Court is not confined to the trial of offences committed before the adjournment. *Reg. v. Dennis*, 3 All. 428.

**5—Arrest of judgment—Objections.**

Objections on motion to arrest judgment are confined to the questions in the case stated by the Judge under the Act. See *Reg. v. Fenety*, 3 All. 182.

**6—Authority to find lesser offence—Mode of procedure established.**

The Revised Statutes cap. 159, sec. 16, by which, on a trial for felony the jury is authorized to acquit of the felony and find a verdict of guilty of a misdemeanour, if the evidence warrants it, establishes a general mode of procedure in all criminal cases, and is not confined to felonies existing at the time of the passing of the Statute; therefore, on an indictment for a felonious assault under the Act 25 Vic. cap. 10, the prisoner may be found guilty of an assault only. *Reg. v. Ryan*, 1 Han. 116.

**7—Jury recommending no bill—Termination.**

Where a bill of indictment laid before the Grand Jury was returned by them into Court with an endorsement "the Grand Jury recommend no bill," and no further proceedings are taken against the party, it is a termination of the prosecution. *Alward v. Sharp*, 1 Han. 286.

**8—Assault—Revenue officer—Breaking open building—Justification.**

By the Revenue Act 11 Vic. cap. 2, a revenue officer is authorized to enter any building wherein he shall have

cause to suspect smuggled goods to be concealed, provided that before entry, information on oath shall be given to a Justice of the Peace, that such officer has reasonable cause to suspect such goods are concealed therein, and that such Justice shall go with the officer to such building, and authorize him to enter and search for goods, and if the doors be closed and admission denied, then after first demanding to be admitted and declaring the purpose of the entry, it shall be lawful for the Justice to direct the officer to enter the building and search for goods. *Held*, That to justify the breaking open a building, there should have been, 1st, a written information on oath; and 2nd, the actual presence of the Justice at the breaking; his being near to the place is not sufficient. *Reg. v. Walsh*, 2 *Al.* 387.

Not opening a building after a proper demand, is a sufficient denial within the Act. *Ibid*.

If the breaking open is unlawful the officer cannot justify the seizure of smuggled goods found within the building. *Ibid*.

*Semble*, That an order to enter, given to a police officer present with the revenue officer, would be sufficient, and that he would be presumed to be acting in aid. *Ibid*.

**9—Information to recover penalties—Breach of Revenue Law—Dutiable articles.**

By Act of Parliament 8 and 9 Vic. cap. 98, gunpowder is prohibited from being imported into the British possessions in America, except from the United Kingdom or some British possession. *Held*, 1st. That gunpowder coming from a foreign country, could not be proceeded against as a non-enumerated dutiable article, under the Provincial Revenue Act 11 Vic. cap. 1, for being imported into the Province at a place not a port of entry, contrary to the Act 11 Vic. cap. 2 sec. 21. But 2nd. That it was liable to seizure and forfeiture under the seventeenth section of that Act, for being landed without entry at the Treasury. *The Attorney General v. four hundred kegs of Gunpowder*, 2 *Al.* 498.

The Provincial Legislature has power to impose additional grounds of forfeiture for breach of the revenue laws, on goods subject to forfeiture under an Act of Parliament. *Ibid.*

**10—Valid panel.**

A sheriff had summoned twenty-four Grand Jurors, but in his list there was the name of B., whom he had intended to summon but did not, and he had omitted to add the name of C., who had been summoned, whose name was, however added to the list by the Clerk of the Court. Twenty-two jurors, including C., were sworn, all of whom had been duly summoned. *Held*, That the panel was valid. It is no ground for quashing an indictment that some of the Grand Jury were related to the officers who arrested the prisoner, neither is a sheriff disqualified from selecting and summoning the Grand Jury, because he directed the arrest. The inclusion of names of unqualified persons in the petit jury panel is not a ground of challenge to the array. Where the sheriff had summoned twenty-six persons as petit jurors, and the Judge struck off the last five names of the list—*Held*, That the summoning of the additional number did not vitiate the panel, and that the last five names were properly struck off. *Regina v. Mailloux*, 3 *Pug.* 493.

**11—Demurrer to challenge—Withdrawal of.**

On the trial of a criminal case, the Attorney-General demurred to a challenge to the array, and the demurrer was overruled, whereupon the Judge allowed him to withdraw his demurrer and traverse; *Held*, (Weldon, J., *dissentiente*,) That this was a matter in the discretion of the Judge, which ought not to be the subject of review, but, per Weldon, J., That so soon as the demurrer was held bad, the panel was thereby quashed, and the whole should have been entered on the record. *Ibid.*

**12—Challenge.**

On a criminal trial the Crown has a right to direct jurors called to stand aside, and is not bound to challenge

for cause until the whole panel is perused. It is a matter in the discretion of the presiding Judge, whether to require a challenge to the polls to be in writing. Expressions used by a jurymen are not a cause of challenge, unless they are to be referred to something of personal ill-will toward the party challenging; and the jurymen, himself, is not to be sworn when the cause of challenge tends to his dishonour—as whether he has been convicted of felony, &c., or whether he has expressed a hostile opinion as to the guilt of the defendant, though he may be examined on the *voir dire* as to his qualification or the leaning of his affections. *Regina v. Chasson*, 3 *Pug.* 546.

**13—Insolvent Act of 1869—Offence under—Special or Common Jury.**

Defendant was tried in August, 1876, for certain offences against the provisions of the Insolvent Act of 1869, committed while that Act was in force. There was no evidence as to whether or not the proceedings were commenced before the Insolvent Act of 1875 came into operation. Section 148 of the Act of 1869 required that all offences under the Act should be tried by a special jury, but the 141st section of the Act of 1875, providing for the trial of offences under the Act, omits the clause requiring a special jury. Defendant was tried by a common jury—*Held*, on a case reserved by Allen, C. J., and Fisher, Wetmore and Duff, J. J., *Weldon, J., diss.*, That the summoning of the Jury, being a matter of procedure, the provisions of the Act of 1869 were superceded by those of the Act of 1875. *Regina v. McLean*. 1 *P. & B.* 377.

**14—Directing jurors to stand aside—Private prosecutor.**

A private prosecutor has the same right as the Crown to direct jurors to stand aside. *Ibid.*

II.

INDICTMENT.

**1—Prosecutor—Grand Juror.**

Where one of the Grand Jurors, by whom an indictment

for forcible entry and detainer was found at the Sessions, was the prosecutor, the indictment having been removed into the Supreme Court, was quashed, though after plea. *Reg. v. Cunard et al.*, *Ber.* 326.

Affidavits shewing that the prosecutor was not present when the bill was found by the Grand Jury, and took no part in the matter, were not received: his name appearing as one of the jurors in the caption of the indictment as returned on the *certiorari*. *Ibid.*

### **2—Allegation—Liability to repair.**

The Corporation of St. John being bound by public law to repair the highways in the city, it is sufficient in an indictment for not repairing, to allege that the defendants "ought of right" to repair, etc., without setting forth the particular ground of liability. *Rex v. Mayor, &c., of St. John*, *Hil. T.* 1828.

The Corporation is not bound to widen a bridge. *Ibid.*

**3**—In an indictment under 1 Rev. Stat. cap. 147, for unlawfully and maliciously pulling down a building, it is not necessary to allege that it was done "riotously." *Reg. v. Elston*, 5 *All* 2.

### **4—Malice.**

If a building is pulled down unlawfully, and without any *bona fide* belief by the defendants that they had a right to do it, the jury may infer malice; malice may be inferred from the commission of a wrongful act, forbidden by law, without any personal malice against the owner of the property. *Ibid.*

### **5—For stealing—Restoring goods—Order by Judge.**

On an indictment for stealing goods, the prisoner was acquitted, the defence being that the goods were his own. *Held*, That it was virtually a finding by the Jury that the goods were not the property of the prosecutor, and therefore, that the Judge had no right to order them to be restored to him. *Reg. v. Eveleth*, 5 *All* 201.

**6—Stealing goods in foreign country.**

On an indictment for stealing, it appeared that the goods were taken in the State of Maine, and brought into this Province. *Held*, That in the absence of proof, that the taking was larceny according to the laws of Maine, the prisoner could not be convicted of larceny here. *Reg. v. Hill*, 5 *All.* 680.

**7—Murder—Conviction for assault.**

On an indictment for murder, the jury found the prisoner guilty of an assault only, and that such assault did not conduce to the death of the deceased. *Held*, on this finding, That the prisoner could not be convicted of an assault under 1 *Rev. Stat.* cap. 149, sec. 20. *Reg. v. Cregan*, 1 *Han.* 86.

**8—County—Vessel passing through**

By the Act 12 *Vic.* cap. 80, sec. 84, where any felony or misdemeanour is committed on any person on board any vessel employed on any voyage on any navigable river, etc., such offence may be dealt with, tried, determined, and punished in any county through any part of which such vessel shall have passed in the course of the passage in which the offence was committed, in the same manner as if it had actually been committed in such county. *Held*, In an indictment for an assault committed on board a steamboat, on its passage between A. and B., but before it came within the county of B., that it was sufficient to allege that the assault took place within the county of B. *Reg. v. Webster*, 1 *All.* 589.

**9—Bodily harm—Design—Setting-out means used.**

By the Act 12 *Vic.* cap. 29, "whosoever shall maliciously by any means manifesting a design to cause grievous bodily harm, attempt to cause grievous bodily harm to any other person, whether any bodily harm be caused to such person or not, shall be guilty of felony." *Held*, That an indictment charging the prisoner with having maliciously assaulted J. M. and cut him with a knife, with intent to do him



grievous bodily harm, concluding *contra formam statuti*, was bad; the means used to manifest the design to commit a felony not being set out with sufficient particularity. *Reg. v. Magee* 2 All. 14.

*Held, also*, That the conviction could not stand for an assault, as the Act (Art. 17) did not apply where the indictment was defective, but where the evidence proved an assault under circumstances not amounting to a felony. *Ibid.*

If the indictment does not charge a felony including an assault, the prisoner cannot be convicted of an assault under Art. 17. *Ibid.*

#### **10—Smuggling—Insufficient allegation.**

An indictment for smuggling, under the Revised Statutes, cap. 29, charged in several counts: 1st. That the defendant unlawfully landed alcohol, subject to duty, and thereby smuggled the same. 2nd. That defendant unlawfully landed alcohol, subject to duty, without reporting to the Treasurer, and thereby smuggled, etc. 3rd. That the defendant landed the alcohol without a permit, and thereby smuggled, etc. 4th. That the defendant landed alcohol without paying the duties. *Held*, 1st. That the indictment was insufficient; as the mere unlawful landing of goods, without alleging any intent to defraud the revenue, did not constitute the offence of smuggling. 2nd. That the landing of goods, without reporting them to the Treasurer, or or without obtaining a permit, though it subjected the party to a penalty, did not amount to smuggling. 3rd. That the mere landing of goods without a previous payment of duties is not a breach of the revenue laws. *Reg. v. Cassidy*, 1 All. 623.

#### **11—Furnishing copies of indictment after acquittal.**

After an acquittal, no copy of an indictment should be furnished without the order of the Judge or the fiat of the Attorney-General. *Heaney v. Lynn*, Ber. 27.

**12—Embezzlement—Property not in prosecutor.**

The prisoner was apprentice to a baker, and had authority from his master to deliver bills for bread to customers, and receive the amounts. In payment of one account he received a bank check, payable to his master "or order," upon which he forged his master's name, and received the money from the bank. *Held*, on these facts, That he could not be convicted on an indictment charging that *he did, by virtue of his employment, as the servant of A. B., take into his possession a certain sum of money, for and on account of the said A. B., and did feloniously embezzle the said money, so being the property of the said A. B., the money received by the prisoner never having been the property of A. B., by reason of the forgery, but the property of the bank; and not having been received by virtue of the prisoner's employment as the servant of A. B.* *Reg. v. Hatheway*, 6 *All.* 382.

See Dominion Statute 32 and 33 Vic. cap. 21, sec. 70, which omits the words—"by virtue of such employment."

**13—Different counts—Separate offence—Evidence.**

Where a prisoner was convicted on an indictment containing two counts, charging separate offences and sentenced, and the evidence did not sustain the charge in one of the counts, but proved an offence of a different character, the judgment was arrested. *Reg. v. Hatheway*, 6 *All.* 352.

**14—Larceny—Place of trial.**

Larceny committed on the high sea on a voyage from Ireland to St. John, does not come within the 1 Rev. Stat cap. 158, sec. 10, relating to the place of trial of offences committed during a voyage, but may be tried under the Act of Parliament, 18 and 19 Vic. cap. 91. *Reg. v. Drillon*, 6 *All.* 61.

**15—Fraudulent appropriation—Place.**

The prisoner received from the prosecutor, in the County of Westmoreland, a quantity of boots and shoes to be sold

on commission ; he took them to the County of Kent, where he resided, and then to the County of Gloucester, where he sold them, and fraudulently appropriated the money to his own use. On an indictment for larceny in the County of Kent, under the Act 27 Vic. cap. 6, sec. 1, which makes the bailee of a chattel, who fraudulently converts it, guilty of larceny,—the jury were unable to agree whether the prisoner fraudulently intended to appropriate the property in the County of Kent, or not until he had sold it in the County of Gloucester. *Held*, That he could not be convicted on the indictment. *Reg. v. Cormier, Mich. T. 1865.*

#### **16—Death caused by drowning.**

An indictment charged the prisoner, being the mother of an infant of tender age, and unable to take care of itself, with feloniously placing it upon the shore of a river in an exposed situation, where it was liable to fall into the water, and abandoning it there with the intent that it should perish ; by means of which exposure the child fell into the river and was suffocated and drowned, of which suffocation, etc., the child died. *Held*, That to support the indictment it was necessary to prove that the death was caused by drowning or suffocation. *Reg. v. Fenety, 3 All. 132.*

The objections on a motion to arrest judgment, are confined to the questions in the case stated by the Judge under the Act. *Ibid.*

#### **17—Feloniously striking—Cause of death.**

An indictment charged the prisoner with feloniously striking the deceased on the head with a handspike, giving him thereby a mortal wound and fracture, of which he died. It was proved that the death was caused by the blow on the head with the handspike, but that there was no external wound or fracture, the immediate cause of death being concussion of the brain, produced by the blow. *Held*, That the evidence supported the indictment. *Reg. v. Shea, 3 All. 129.*

**18—Resisting constable—Form of Execution.**

An execution issued by a Justice of the Peace is sufficient, if it substantially follows the form K in the schedule to the Rev. Stat. cap. 187; and any person resisting a constable in executing it is liable to indictment. *Reg. v. McDonald*, 4 All. 440.

**19—Regulations—Penalty—Misdemeanour.**

By Act Wm. IV., cap. 28, sec. 5, Boards of Health were authorized to make such rules and regulations for the preservation of the public health, and the prevention of infectious distempers, with such penalties and forfeitures for breach thereof, as they might deem necessary. By subsequent sections of the Act they were authorized to enter buildings and cause the removal of anything injurious to health; to close up streets, etc.; to prevent intercourse with vessels, and order them to quarantine; and by sec. 11, whoever should violate any of the orders of the Board, or wilfully neglect to act in obedience thereto, or should resist or obstruct the lawful execution of any such orders, should, for every offence "be deemed guilty of, and punishable as for a misdemeanour." The Board made a regulation against the use of slaughter-houses within certain limits, but attached no penalty to the breach of it. *Held*, 1st. That the omission of a penalty did not render the regulation void; and that the defendant was liable to indictment for a breach of it either at common law or under the 11th section. 2nd. That the 11th section applied to the violation of any regulation or order the Board was authorized to make, and was not limited to the orders authorized by the sections of the Act, subsequent to the fifth section. *Reg. v. Hartt*, Trin. T. 1838.

**20—Forgery—Bank note—What amounts to.**

Forgery, or uttering in this Province a writing purporting to be a bank note issued by a Banking Company in the State of Maine, amounts to the crime of forgery, though it is not proved that the Company had power by its charter to issue notes of that description. *Reg. v. Brown*, 3 All. 18.

**21—Perjury—Power to administer oath.**

A commissioner authorized to take affidavits in the Supreme Court, has no power to take an affidavit of the service of an order in case of review of the judgment of a Justice of the Peace, and the party swearing falsely in such an affidavit cannot be indicted for perjury. *Reg v. McIntosh*, 1 *Han.* 372.

**22**———*Semble*, Perjury may be assigned where the oath has been administered on the Common Prayer Book of the Church of England. See *McAdam v. Weaver*, 2 *Kerr* 176.

*See Perjury.*

**23—Overseers of poor—Not accounting—Indictment.**

An overseer of the poor of a parish is liable under the Acts of Assembly 26 Geo. III. cap. 28 and 43, and 33 Geo. III. cap. 6, to an indictment for not accounting at the first General Sessions of the Peace in the year, for moneys received by him for the support of the poor during the preceding year. It is not necessary that the indictment should be against all the overseers, nor that it should allege that they all neglected to account, if it charge the defendant specifically with the receipt of money for which he did not account. *Reg. v. Matthew*, 2 *Kerr* 543.

**24—Use of word “feloniously”—Instead of words in Act—Objection when to be taken—Amendment.**

An indictment for doing grievous bodily harm, which alleged that the prisoner did—“feloniously stab, cut, and wound.” &c., instead of alleging, in the terms of the 17th section of 32 and 33 Vic. cap. 20, that he did “unlawfully and maliciously” stab, &c., is good.

A defective indictment is amendable under 32 and 33 Vic. cap. 20, sec. 32, and any objection to it for any defect apparent on the face of it, must be taken by demurrer or motion to quash the indictment before the defendant has pleaded, and not afterwards. *Regina v. Flynn*, 2 *P. & B.* 321.

**25—Intent—Setting fire—Allegation.**

An indictment, charging a prisoner with having felon-

iously and maliciously set fire to a barn containing hay, be according to the form contained in the schedule to the Act 32 and 38, Vic. cap. 29, (malicious injuries to property) is good, and it is not necessary to allege the intent to injure or defraud the prosecutor. *Regina v. Soucie*, 1 P. & B. 611.

### **26 Amending Indictment—Terms.**

An indictment, framed under the 147th section of the Insolvent Act of 1869, omitted the words “with intent to defraud his creditors.” Defendant pleaded to the indictment, but afterwards applied for leave to withdraw his plea and demur, but the Judge decided that, if he allowed this he should also permit the prosecutor to amend the indictment by inserting those words. *Held*, That his decision was right. *Regina v. McLean*, 1 P. & B. 377.

## **III.**

### **EVIDENCE.**

#### **1 Evidence—Confession of Accomplice.**

In an action of trespass for false imprisonment, the defendant pleaded that a felony had been committed, and he had reasonable grounds to suspect the plaintiff, and therefore arrested and detained him until he was taken before a magistrate. *Held*, That the confession of a third person that he, together with the plaintiff, committed the felony, was not admissible in evidence as proof of the felony. *Blair v. Hopkins*, 1 Kerr 540.

#### **2—Wife of one of two parties on trial not competent witness for either.**

A. and B. were tried together on a joint indictment for an assault on a peace officer, and the wife of A. was offered as a witness to disprove the charge against B. *Held*, That her evidence was properly rejected, but had the husband not been on his trial she would have been a competent witness. *The Queen v. Thompson and Conroy*, 2 Han. 71.

*Idem*, (See *The Queen v. Thompson and others*, L. R. Vol. I. Crown C. Reserved 377.

**3—Deceased Witness—Statement.**

The statement of a deceased person, taken on oath by a magistrate, detailing the circumstances under which a felony was committed upon him, is admissible in evidence on the trial of the accused under 1 Rev. Stat. cap. 156, sec. 7, though it is headed, "The complaint," etc., instead of "The examination," etc., and does not appear on its face to have been taken in the presence of the accused, it being proved that it was taken in his presence. *Reg. v. Millar*, 5 All. 87.

**4—Riot—Evidence before Grand Jury—Conversations—Previous conduct—Cross Examination—Previous statements—Contradiction.**

On the trial of an indictment for riot, evidence of general conversations between a witness and the person at whose house the prisoners were alleged to have committed the riot was not allowed to be given.

A witness may be asked, on cross-examination, if he has not previously made a statement by which it is proposed to contradict him, and he cannot be asked generally to relate a conversation with another person in order to enable the cross-examination counsel to discover whether any of his statements vary from his evidence on the trial.

A counsel has no right, on cross-examination of a witness, to go into evidence of what has taken place before the Grand Jury, though he may shew that a witness gave different evidence before the Grand Jury from that which he had given on the trial.

On the trial of an indictment for riot and unlawful assembly on the 15th January, evidence was given on the part of the prosecution of the conduct of the prisoners on the day previous, for the purpose of shewing (as was alleged) that B., in whose office one act of riot was committed, had reason to be alarmed when the prisoners came to his office. The prisoners thereupon claimed the right to shew that they had met on the 14th to attend a school-meeting, and claimed the right to give evidence of what took place

at the school-meeting, but the evidence was rejected ; and, *Held*, (per Allen, C. J., and Fisher and Duff, J. J., Weldon and Wetmore, J. J., *dissenting*), That the evidence was properly rejected, because the conduct of the prisoners on the fourteenth could not qualify or explain their conduct on the following day. *Regina v. Mailloux*, 3 *Pug.* 498.

#### **5—Unlawful assembly—Conviction.**

It is no ground for quashing a conviction for unlawful assembly on one day, that evidence of an unlawful assembly on another day has been improperly received, if the latter charge was abandoned by the prosecuting counsel at the close of the case, and there was ample evidence to sustain the conviction. *Reg. v. Mailloux*, 3 *Pug.* 498.

#### **6 — Declaration of prisoner before being charged with crime.**

A declaration made by a prisoner, tried on an indictment for larceny, before he was charged with the crime, in answer to a question asked him, where he got the property is evidence on his behalf. On the trial of an indictment for larceny of a watch, the prisoner's counsel called a witness W., who stated that the prisoner was drinking at a public house on the evening when the alleged offence was committed, and had the watch with him ; that W. went home with the prisoner, and they sat down in the house, that while they were sitting there, the prisoner fell upon the floor and the watch fell out of his pocket, and W. picked it up and asked him where he got it. His answer to this question was rejected. The prisoner being convicted, it was held by the Court on a case reserved, that the evidence should have been received, and the conviction was quashed. *Reg. v. Ferguson* 3 *Pug.* 612.

#### **7—Declarations—Prisoners—Depositions.**

Where several persons were resisting constables who sought to arrest them, and M., one of the persons resisting, was killed by one of the constables, and G., one of the latter was also killed by a shot fired by the other party ; on



the trial of an indictment for the killing of the constable, a question put by defendant's counsel to another constable, on cross-examination, as to whether he had not boasted that he had shot M., was held to have been improperly rejected. Questions relating to collateral facts may be put to a witness for the purpose of discrediting his testimony and shewing his interest, motives and prejudices. Therefore, on the trial of indictment for murder, the following questions put to a witness by the prisoner's counsel on cross-examination, viz.: Whether he had not declared that no Roman Catholic should sit on the jury; whether he had not been constantly advising with the Attorney-General, as to which of the jurors should be ordered to stand aside; and whether it was not his desire, as a member of the Government, to procure a conviction, were held to have been improperly rejected. Where a number of persons, against whom warrants had been issued, were met together, at a certain house, and on the officers of the law attempting to arrest them, one of the latter was killed by a shot fired by some of the party, though it was not known by which, and all were indicted for murder. On the trial of one of them, it was held competent for the prisoners who were not on their trial, and were called as witnesses, to state the purpose for which they went to the house, in order to disprove the inference that they were there for an unlawful purpose—(Wetmore, J., *dubitante*;) though declarations of the prisoners would not be admissible, unless accompanying and explanatory of an act, and thereby becoming part of the *res gestæ*. Evidence of one crime may be given to shew a motive for committing another; and where several felonies are all parts of the same transaction, evidence of all is admissible upon the trial of an indictment for any of them, but where a prisoner indicted for murder, committed while resisting constables about to arrest him, had, with others, being guilty of riotous acts several days before, it is doubtful if evidence of such riotous conduct is admissible, even for the purpose of shewing the prisoner's knowledge that he was liable to be arrested, and therefore had a motive to resist the officers. Depo-

sitions made and signed by a party at an inquest may be received in evidence to contradict him, whether the inquest was illegally taken or not, as being statements of the witness made on a previous occasion. *Regina v. Chasson*, 3 Pug. 546.

### **8—Statement by prisoners.**

Section 32 of the Act 32-33 Vic. cap. 30 is directory, and a statement made by a prisoner, as provided for by that Act, may be used in evidence against him, although the Justice has not complied with the provisions of that section, if it appears that the prisoner was not induced to make the statement by any promise or threat. *Reg. v. Sourie*, 1 P. & B. 611.

### **9—Insolvent Act—Evidence—Immaterial allegation.**

On the trial of an indictment against an insolvent for (among other alleged offences,) disposing of property which remained unpaid for, otherwise than in the ordinary course of business, it is competent for the defendant to give in evidence the reasons for the transfers stated at the time. Where an indictment against an insolvent alleged that *having made* an assignment under the Insolvent Act, he mutilated and altered one of his books; and the evidence was that the mutilation or alteration took place about three months previous to the defendant's assignment; the jury found that the act was done with intent to defraud his creditors; and on a case reserved, it was objected that the evidence did not support the indictment, but *Held*, That the allegation of *having made* an assignment was immaterial, and the conviction was sustained. If an insolvent has book debts owing to him, however small, he is bound to insert them in his statement; and if he omits them with intent to defraud his creditors, he is guilty of a misdemeanour, and the fact of calling the statement a schedule in the indictment is not a misdescription. *Reg. v. McLean*, 1 P. & B. 877.

## **IV.**

### **MISCELLANEOUS.**

#### **Constable—Fees—Judge certifying.**

A Judge presiding at a Court of Oyer and Terminer has

no power to make an order for the payment of constable for attending the Court, or swearing the attendance of witnesses in a criminal trial. (But see Acts of Assembly 35 Vic. cap. 12) *Mulligan v. Rainsford*, 2 Han. 1.

Certified fees of a constable may be recovered in an action before a Justice of the Peace, when sufficient funds in County Treasurer's hands to pay them. *Ibid.*

Acts relating to attendance of Grand and Petit Jurors in criminal matters at County Courts are within powers of local Legislature. See County Courts 10.

#### **Adultery—Married man.**

A married man may be convicted of adultery under the Revised Statutes, cap. 145, though the offence is committed with an unmarried woman. *Regina v. Eyre*, 1 P. & B. 189.

#### **Common assault—Conviction for—On trial for felony**

L. was tried on an indictment under 32 and 33 Vic. cap. 20, containing four counts. The first charged that he did unlawfully, &c., kick, strike, wound and do grievous bodily harm to W., with intent, &c., to maim; the second charged the assault as in first with intent to disfigure; the third charged the intent to disable; the fourth charged the intent to do some grievous bodily harm. The prisoner was found guilty of a common assault. *Held*, That L. was rightly convicted, section 51 of the Act 32 and 33 Vic. cap. 20 authorizing such conviction. *Regina v. Lackey*, 1 P. & B. 198.

#### **Mens rea.**

If a man knowingly does acts which are unlawful, the presumption of law is that the *mens rea* exists; ignorance of law will not excuse him. *Reg. v. Mailloux*, 3 Pug. 493.

#### **Nolle prosequi—Power of Clerk of Crown to enter—Second indictment for same offence—Several counts—Distinct indictments.**

The prisoner was convicted of receiving stolen goods, on an indictment containing two counts, one for stealing the goods and the other for receiving them, knowing them to have been stolen. The prisoner had, on a former day, in the same Circuit, been indicted for stealing the same goods as those which he was charged with stealing by the

first count of the present indictment. A jury was impanelled and the trial of the prisoner begun, but in consequence of it appearing from the testimony that the prisoner could not be convicted for larceny, the Clerk of the Crown, who was conducting the prosecution by direction of the Attorney-General, entered a *nolle prosequi*, and then sent another bill before the Grand Jury, containing a count for receiving the indictment on which the conviction took place, and on the trial he consented that the prisoner should be acquitted of the charge accordingly—*Held*, on a case reserved, 1. That the Clerk of the Crown has authority to enter a *nolle prosequi*. 2. That a *nol. pros.* being entered the prisoner could be again indicted for the same offence. 3. Even admitting that the Clerk of the Crown has no authority to enter a *nol. pros.*, the conviction upon the count for receiving would be good, each count being a separate indictment in itself. *Regina v. Thornton*, 2 P. & B. 140.

#### **CRIMINAL INFORMATION.**

1———If the conduct of the prosecutor has been blameable, the Court will not grant a criminal information against a magistrate, at his instance; but if the conduct of the magistrate is not justifiable, the rule will be discharged without costs. *Rex v. Munro*, East T. 1831.

2———A rule for a criminal information will be discharged with costs, where the facts upon which it was granted are disproved by the affidavit on shewing cause. *Rex v. Bates*, Trin. T. 1832.

#### **CROSS ACTION.**

See Damages 11.

#### **CROSS EXAMINATION.**

**No right to prove justification upon, before defence opened—Re-examination upon—As to contents of written statement.**

See Evidence VIII.

#### **CROWN.**

**Right to enter on land used as a public road.**

See Highway 17.

**CROWN BONDS.**

The Statute 33 Hen. VIII. cap. 39, extends to this Province, and therefore the lands of a bond debtor to the King are bound from the date of the bond. *Rex v. McLaughlan, Mich. T. 1830.*

**1—Admission—No estoppel.**

In an action on a Crown Bond, in which the defendant pleaded *non est factum*, proof of an admission by him that it was his bond, is not an estoppel; and evidence having been given by the Crown of the handwriting of the subscribing witness, the defendant was allowed to give evidence that the signature of the witness was a forgery. *Reg. v. Robertson, 6 All. 113.*

**2—Summary application for relief—Scire facias.**

Where the Attorney-General had instituted a suit on behalf of the Crown by *scire facias* on a Treasury Bond, conditioned for the payment of duties, the Court refused upon a summary application on affidavits for relief under the Statute 33 Hen. VIII. cap. 39, to determine the question as to the defendant's liability, the defendant not having pleaded to the *sci. fa.*, and the Attorney-General not assenting to the application. *Regina v. Street, 1 Kerr 373.*

**Sureties application for relief under 33 Hen. VIII. cap. 39, sec. 79.**

*See Principal and Surety 7.*

**CROWN GRANT.****I. CONSTRUCTION. BOUNDARIES.**

Evidence.

Possession.

Meaning of Words.

Necessity of Inquest of Office.

**II. RIGHTS.**

Mines and Minerals.

Fishery.

Glebe.

Seizin.

Ferry.

Right to Soil.

### III. EXCEPTIONS.

Mines.

Minerals.

Coals.

### IV. ADMISSION. ADVERSE POSSESSION.

Against Crown.

Extension of boundaries by.

Subsequent Grant.

#### I.

#### CONSTRUCTION.

##### 1—Controlling line.

Letters patent granted land described as extending from a certain point thirty-two chains, or to a certain road, and thence to run a certain distance "on said road:" the road was sixty-nine chains distant from the starting point. *Held*, That the words of the grant necessarily imported that the second alternative in the description should be the controlling one, and that the land was bounded by the road. *Rex v. Wilson, Ber. 1.*

##### 2—Bounded by lake—Margin.

A grant of land bounding on a lake, conveys the land to the margin only, and not to the centre of the lake. *Miles v. Burke, 1 Pug. 237.*

##### 3 — Dividing lines — Boundaries — Several grants — Courses inconsistent.

The course laid down for the rear or dividing line between two several ranges of lots, granted by the Crown in two contemporaneous grants, founded upon one general survey of land lying between the St. John and the Kennebecasis rivers, is not conclusive, where it is manifest that such course does not correspond with the delineation on the grant plan; is inconsistent with other parts of the description in both grants, and will not properly divide the

land, or give the lots their several lengths and quantities. *Fowler v. Douling*, 1 Kerr 581. (Confirmed in *Barrat v. Scott*, 2 Pug. 494.

#### **4—Boundaries—Protraction.**

In construing the description of boundaries in a grant, ascertain lines, in the nature of fixed objects, will control courses and distances, when the course of a line is not expressed, protraction on the plan of the grant may be resorted to as an element for ascertaining the course. The marks of the original survey are to be sought for and adhered to in determining the boundaries of a grant. *Whelpley v. Lyons*, 2 Kerr 276.

#### **5—Subsequent grants—Reference to.**

If the bounds of a lot of land are clearly ascertained by the grant, it cannot be extended by subsequent grants; but if there is any uncertainty as to the lines of a grant, subsequent grants of the Crown to other persons of adjoining lands on which the lines of the prior grant are described, may be referred to, in order to shew where the Crown considered the lines of the prior grant to be. *Doe dem. Pengford v. Vernon*, 2 Kerr 351.

#### **5 a—Adoption of line by Crown—Description in previous grants.**

Plaintiff claimed, under a grant issued in 1868, which described his land as running to the rear or last line of the Penobscott Association Grant, and referred to the plan annexed, which laid down that last line; but the plaintiff contended that the line so described on the plan was not the correct line of the old Penobscott grant, and that his land therefore would extend beyond that to where he contended the correct line was. The defendants shewed that by several other grants besides the one to the plaintiff, the same line as laid down on the plaintiff's plan had been described on the plans as the said last line, and the Court *Held*, That in that way the Crown had adopted that as the true line of the Penobscott grant, and that the plaintiff could only claim to it. *Arwin v. McClure*, *East. T.* 1871.

**6—Subsequent grant—Evidence of possession out of Crown.**

Where land granted by the Crown in 1839 was described as being in rear of a certain lot No. 33, and *between that lot* and a lot No. 39, granted in 1784, subsequent grants from the Crown in 1786 and 1787 of adjoining lands to third persons, in which lot No. 33 is described as extending to and bounded on lot No. 39, an evidence to shew the Crown out of possession of the land described in the grant of 1839, so as to prevent that grant from operating without a previous inquest of office to re-vest the possession in the Crown. *Doe dem. Ponsford v. Vernon*, 2 Kerr 351.

**7—Explanatory, but not to alter or vary.**

If there is any uncertainty as to the lines of a tract of land granted by the Crown, subsequent grants from the Crown to other persons in which the prior grant is referred to, may be looked to for the purpose of considering where the Crown considered the lines of the prior grant to be; but not to vary its description, or alter its construction. *Doe dem. Carpenter v. Jones*, 3 Kerr 155.

**8—Evidence—Bounds.**

A grant from the Crown is not conclusive evidence as to the bounds of any grant referred to therein, further than such bounds affect the premises of the grant itself. *Doe dem. Carpenter v. Jones*, 3 Kerr 155.

**9—Courses and lines by description in grant.**

The true lines of a tract of land must be ascertained by the courses and distances specified in the grant, and particularly delineated on the plan of survey annexed. When there is no ambiguity in the description, and no proof of any actual survey contemporaneous with the grant, varying from the courses and distances therein specified. *Doe dem. Morrison v. McAlpin*, 2 Kerr 467.

**10—Prior and subsequent grants—Description.**

A prior grant must have its effect, and the Crown cannot by a subsequent grant derogate from its own act, and limit the boundaries of the prior grant. Thus, where a



grant to the plaintiff was described as commencing at a stake standing at the south east angle of lot No. 8, and by the plan annexed to the grant this stake was represented as distant 12 chains from the south east angle of lot No. 7 (a fixed point,) thereby shewing lot No. 8 to be 12 chains wide, and by a subsequent grant of lot No. 8, also described as commencing at the south-east angle of the same lot No. 7, it was represented as being 15 chains wide. *Held*, That this could not interfere with the prior grant to the plaintiff. *Robinson v. Wilson*, 3 Kerr 301.

**11—Lines agreed and acted upon—Rectifying error  
—Reasonable time.**

In ejectment, the lessor of the plaintiff for upwards of twenty years before the defendant's occupation, was in possession of the *locus in quo* as part of lot 43, granted in 1809, up to the rear of the boundary of that grant, ran by a Crown surveyor in 1828; and it appeared in defence that the line so run in 1828 was at the instance of the lessor, who took part in the survey and established the rear boundary, and this rear boundary was made the base line of a second tier of lots surveyed and returned to the land office, upon which a grant of such lots afterwards came out and was predicated, and the defendant became the purchaser of lot 43 at Sheriff's sale, and went into possession of the *locus in quo* as part of it about eighteen months before the trial; the lessor, in reply, shewed that after such possession he, without the assent of the defendant, got another surveyor to run the rear line, who made it eight rods farther in than the Crown surveyor had done, and endeavoured to shew by several witnesses a mistake in the first rear line, and that the lessor, by reason of his long possession, was entitled to the surplus as against the defendant's deed of lot 43. The learned Judge however ruled at the trial, that, whether, a mistake or not, it could not be rectified after so long a period, but the first line having been agreed to at the time, and acted on by all parties interested, neither the Crown itself nor any person coming in under it, could then dispute such line. On motion for a

new trial, on the ground of misdirection—*Held*, That such direction was right. *Seem*, That sixteen years is not a reasonable time within which to rectify such an error. *Doe dem. Belding v. Hallet*, 3 Kerr 359.

**12—Lines ascertained by earlier grant—Exterior Boundaries and Interior Divisions inconsistent—Acquiescence.**

The plaintiff and defendant being proprietors of adjoining tracts of land, the boundary between which tracts had not been ascertained by actual survey at the date of the grant and was in dispute—the tract belonging to the plaintiff being contained in a grant made by the Crown in 1809, and that of the defendant in a grant made in 1806. *Held*, That the true line must be ascertained by the terms of the earlier grant, regard being first had to the natural boundaries stated in the grant, and in subordination thereto, to the specified courses and distances—giving preference to the one or the other according to circumstances. *Brevier v. Govany*, 4 All. 144.

The expression of quantity in a grant is descriptive, and is not to be disregarded where the boundaries are doubtful. *Ibid*.

The courses and distances of the exterior boundaries of a grant are rather adhered to, than those of the interior division of the tract into lots, where both cannot be reconciled, and the dispute relates to the exterior boundary. *Ibid*.

The running and marking of a line by one party, but not in accordance with the true line between adjoining grants, having only been assented to on the condition that the true line should be ascertained and run, cannot establish it as a conventional boundary until it is acquiesced in and acted upon by both parties. *Brevier v. Govany*, 4 All. 144.

**13—Boundary by Shore of Tide River—Land below high-water mark.**

A grant bounded by the shore of a tide river does not convey any title to the land below high-water mark, though it is described as one tract of land situated on both sides of the river. *Lock v. Cleveland*. 1 All. 890.

**14—Controlling Distances—Ascertained Angle.**

Where one of the lines of a grant was described as running a certain number of chains, or the north-westerly angle of a grant to A., such angle being capable of ascertainment, controls the distances mentioned in the grant, whether it exceeds or falls short of the specified number of chains. *Hanson v. Mawheney*, 2 *Han.* 11.

**15—Land Unimproved or Unoccupied within Twenty Years—No Adverse Possession.**

The grantee of the Crown, according to the ordinary mode of granting wild land in this Province, being deemed *prima facie* in possession of the land granted when there is no adverse occupant, it is sufficient for a plaintiff in ejectment, who claims under such a grant more than twenty years old, to shew that the land within that period remained in its natural state and unenclosed. *Doe dem. Des Barres v. White*, 1 *Kerr* 595.

**16—Recitals—Non-Registry—Inquest.**

A grant of land from the Crown to A. in 1805 recited that a prior grant of the same land had been made to B. in 1765, under the great seal of Nova Scotia, and that such grant had not been registered in this Province, as required by the Act of Assembly 26 Geo. III, cap. 2, and also recited that it had been represented to the Government of this Province that the land had been sold and conveyed by B. to A. *Held*, 1st. That the recitals must be taken together, and that in the absence of any other evidence of the grant to B., and of the conveyance by him to A., the title of A., under the grant of 1805, was not disproved by the recital of the prior grant to B. 2nd. That the non-registry of the grant to B. under the Act 26 Geo. 3, cap. 2, need not be found by inquest of office in order to enable the Crown to re-grant, at least, to the original grantee or his assigns. *Doe dem. Des Barres v. White*. 1 *Kerr* 595.

**17—Subsequent Grant—Recognition of Lines of Prior Grant—Presumption of Adoption by Crown.**

A grant from the Crown to A. and others, was described as extending from the first bound 500 chains, or until it

met the prolongation of the rear line of a prior grant. The line of A's. grant was extended the 500 chains, and a rear line run at the end of that distance, upon which rear line the Crown afterwards bounded several grants of land by actual survey. *Held*, That as between the owners of lots in the grant to A., and the grantees in rear, that line must be considered as the boundary between the grants, though it appeared by a subsequent survey that it was twenty chains too far to the rear. *Held also*, That as the Crown, after discovering the error, took no steps to rectify it, it might be presumed to have adopted it as the rear line. *Gaudin v. McKilligan*, 2 All. 392.

**18—Conditional Grant—Information for Intrusion—Inquest of Office—Authority to give Notice.**

The Crown by letters patent under the great seal, granted to the defendant the right to occupy land for twenty-one years, unless the same should sooner be required by the Crown, on notice of which the grant was to cease and be void. *Held*, on an information for intrusion, after notice and refusal to give up possession, That as the removal of the defendant was not founded on any breach of condition, or forfeiture, no inquest of office was necessary to terminate his right. *The Queen v. Herbert*, 2 All. 427.

*Semble*, That a notice that the Government required the land, signed by the Surveyor-General of Crown Lands in his official character, was sufficient, without proof of any previous authority from the Crown to give the notice. *Ibid*

The Crown, by subsequently laying out the land into lots and granting it, recognizes the authority of the Surveyor-General to give the notice. *Ibid*.

**19—Words “bank or edge,” meaning of—Lake—Right to soil.**

Where a grant from the Crown to B. was described as “beginning at a stake standing on the bank or edge of Round Lake, and (after describing other courses), thence south, etc., to a stake standing on the westerly bank or edge

of said lake, and thence following the several courses of the said bank or edge, to the place of beginning." *Held*, That the words "bank or edge," were intended to express the margin, and made the water's edge the boundary of A's grant.

N. received from the Crown a grant of Round Lake *eo nomine*, with all profits, hereditaments, etc., reserving to the Crown all mines and minerals. *Held*, That the grant conveyed the soil of the lake. *Burke v. Niles*, 2 *Han.* 166.

## **20—Contiguous Islands—Low Water—Meaning.**

By a grant of an Island, "with all the contiguous small Islands that are joined to, or connected with the said Island by a beach or shoal dry at low water," an Island that is connected with the principal one by a shoal which is only dry at extraordinary tides will not pass. *Doe dem v. Hill*, 2 *All.* 587.

"Low water" means low water at ordinary tides. *Ibid.*

## **II.**

### **RIGHTS.**

#### **1.—Mines and Minerals—Condition—Construction—Necessity of Inquest of Office.**

The Crown granted by letters patent to B., his executors, etc., the sole and exclusive right to make use of, work occupy and enjoy for his benefit and advantage for the term of twenty-five years, all mines and minerals which might then have been discovered, or which might, during the continuance of the letters patent, be discovered within the bounds of certain described lands, paying therefore quarterly during the term to the use of the Queen, one shilling per chaldron for all coals which should be raised from the mines, and a duty of five per cent on the value of all other minerals which should be raised during the term. *Proviso*, That if B., his executors, etc., should neglect to pay the rent or duty at the times specified, or should not commence to work the mines effectually within two years, the letters patent should cease and be void, and it should be lawful for the Crown to enter. *Held*, 1st.

That until mines were discovered and entered upon, the instrument did not amount to a lease, but operated either as a license to dig for minerals or as a grant of an incorporeal right only; and therefore that no inquest of office was necessary to enable the Crown to take advantage of a breach of the condition. 2nd. That the patent was not absolutely void for breach of the condition, but voidable only at the election of the Crown, and that the intention of the Crown to take advantage of the breach was sufficiently manifested by the grant of a new patent to D. inconsistent with the previous patent to B., without any entry by the Crown. 3rd. That if the patent to B. had operated as a lease of the mines, or granted a corporeal hereditament, the Crown could not have taken advantage of a forfeiture, so as to re-grant the mines, without inquest of office or *scire facias*. *Le Gal v. Duffy*, 3 All. 57.

### 2—Fishery.

By the Act 14 Vic. cap. 31, the Governor in Council was authorized to grant leases or licenses of occupation for Fishery Stations on the ungranted shores, beaches or islands of the Province. A grant was made to the plaintiff for the exclusive leave and license to occupy and enjoy as a fishing ground for the term of four years, a lot or beach abutted and described as follows, viz: "lot No. 4, on the outside of Portage Island; with the full and exclusive privilege of using the said lot or station as a fishing station." *Held*, That this grant did not convey any right of fishing, but merely a right to occupy a certain portion of the shore, and therefore that the defendant was not liable to an action for setting nets in front of the plaintiff's lot below low-water mark, and thereby preventing the fish from entering the plaintiff's nets. *Hierlhy v. Loggie*, 3 All. 204.

### 3—Glebe.

A grant of land to the Rector, Church Wardens and Vestry of a parish "for a glebe," sufficiently signifies it to be for the use and benefit of the Rector, under Act 56 Geo. III, cap. 11. *Rector, &c., of Hampton v. Titus*, 1 All. 278.

**4—Seisin—Possession—Unoccupied Land.**

A grant of land from the Crown under the great seal, conveys seisin to the grantee, and his possession will *prima facie* be deemed to continue, while the land remains unoccupied and unimproved. *Doe dem. Kimpson v. Croft*, 1 Kerr 546.

5—A grantee of the Crown is deemed to be in possession while the land remains unoccupied and unimproved. *Doe v. Chace*, 3 All. 501.

**6—Ferry—Infringement of Right.**

The Crown granted a ferry across the river Miramichi, between the parishes of C. and N., opposite the court house of the County, and communicating with the highway on each side of the river: the landing used on one side of the river was about two hundred yards above the court house. *Held*, That it was an infringement of the grantee's right to establish another ferry landing at the same place. *Fraser v. Drynan*, 4 All. 74.

**7—Privilege—No Right to Soil.**

A grant from the Crown of a privilege to build mills in the bed of a river, does not convey any right to the soil, therefore the grantee cannot, before actual entry in the exercise of the privilege, maintain trespass against a person for building a mill upon the place where the privilege was granted. *Frink v. Hill. East. T.* 1831.

**8—Grant of Land Between High and Low-Water Mark—Jus Publicum.**

The plaintiff was the owner of lot No. 1 in the city of St. John, granted nine months before the charter of the city, which lot was, by the terms of the grant, to extend to low water mark. He was in the act of erecting a pier on the land between high and low water mark, when he was interfered with by the defendants, acting under the authority of the Corporation, who removed the pier as an obstruction and a nuisance. Trespass being brought. *Held*, (*Welden, J., diss.*), that the plaintiff's grant was subject to the *jus publicum* of passing and repassing between high

and low-water mark, and that the Corporation, who are by law the conservators of the harbour, were justified in removing the obstruction. *Brown v. Reed*, 2 *Puq.* 206.

### III.

#### EXCEPTIONS.

##### 1—Mines and minerals.

The Crown may grant land, and except the base mines and minerals therein. *McMahon v. Berton*, 2 *All.* 321.

By a grant from the Crown of a tract of land "with the appurtenances and hereditaments thereto belonging, and mines and minerals; saving and reserving all mines of gold, silver, copper, lead, and coals;" coal mines are excepted, though no other minerals have been discovered in the land. Such an exception, without reserving a right to enter and dig, will not, as a legal incident thereto, give a right to do any act on the land which will injure the surface; and *Quere*, Whether a bare right of entry would be given as incident to such exception. *Ibid.*

*Semble*, That if the mine had been opened and worked by the Crown before the grant of the land, the rights incident to the exception would have been more extensive. *Ibid.*

##### 2—All coals—Construction—Injury to surface—License.

An exception in a Crown grant of "all coals, and all gold and silver and other mines and minerals" extends to all carbonaceous minerals; and therefore a mineral, though not strictly coal, is excepted. *Gesner v. Cairns*, 2 *All.* 595.

The construction of a Crown grant cannot be limited by the Royal instructions, directing the Governor of the Province to reserve to the Crown certain minerals. *Ibid.*

A license from the Crown to dig minerals in granted land where the mines are excepted out of the grant, will not justify an injury to the surface soil. *Ibid.*



## IV.

## ADMISSION—ADVERSE POSSESSION AGAINST CROWN.

**1**———An admission in a grant from the Crown under the great seal of the Province, is evidence against the Crown. *Rex v. Wilson, Ber. 1.*

**2—Adverse possession against Crown—Sufficiency.**

To prevent a Crown grant from taking effect on the ground that the Crown had been out of possession for twenty years before that grant issued, the adverse possession should be defined, continuous and unequivocal. Mere isolated acts of trespass, without visible limit, and merely lumbering on the wilderness land of the Crown, without clearly defined bounds, are not sufficient. *Smith v. Morrow, 1 Pug. 200.*

**3—Extending boundaries by Crown after grant.**

The Crown may by a subsequent grant extend the boundaries of former grant beyond the distance mentioned therein, so far as relates to the rights of the parties claiming under the respective grants, *inter se*, though the Crown may not be estopped thereby as against the grantee in the first grant. *Aiton v. Demill, 1 Pug. 164.*

## CROWN TIMBER.

**1—Seizure of timber—Place—Onus probandi.**

Certain sticks of white pine timber having been seized by the proper officers of the Crown, as forfeited under the Acts of Parliament 8 Geo. I, cap. 12, and 2 Geo. II. cap. 35—*Held*, That upon the prosecution of such seizure, the *onus probandi* as to the place where the sticks were cut being private, and not Crown property lies upon the claimant. *Reg. v. Beveridge, 1 Kerr 58.*

**2—Liability to seizure—Disputed territory.**

If timber has been cut upon Crown lands over which this Province has exercised and continues to exercise jurisdiction, it is liable to seizure here, though the territory where it is cut is claimed by the Government of Canada as being part of that Province, and license to cut timber has been granted by that Government. *Tibbitts v. Allan, 3 Kerr 280.*

**Crown servant.**

*See* Government Officer.

**Cumulative remedy.**

*See* Wharfage 1.

Justice of Peace IV. 28.

**CURRENCY AND STERLING.****Bills of exchange—Premium—Standard.**

Where accounts are kept in sterling money, the premium on bills of exchange drawn on England is not to be taken as the standard to ascertain the difference between currency and sterling, unless the money is payable in England. *Quære*, Whether in such a case the value of sterling money, fixed by the Act 15 Vic. cap. 85, should not be taken as the standard. *Spurr v. Allison*, 8 All. 454.

**CUSTOM AND USAGE OF TRADE.****As to bills of exchange—Drawing—Lex mercatoria.**

*See* Bills and Notes I. 6.

**Signing judgment by default.**

*See* City Court.

**Practice contrary to regulations of Government—  
License cutting timber—Whether evidence of  
practice allowable.**

*See* Evidence III. 13.

**Issue on invalid custom.**

*See* New Trial III. 33.

**As to payment of rent.**

*See* Landlord and Tenant III. 18.

**Timber trade—Acceptors of timber orders.**

*See* Contract 2.

**Port of call and discharge and loading—Construing  
policy of insurance in reference to.**

*See* Insurance 21.

**Scowage—Loading ship.**

*See* Contract.

**Goods laden on board ship deck according to custom of particular trade—Owner is entitled to contribution in general average for a loss by jettison.**

*See Shipping Law 10.*

**Pond keeper—Lien on timber.**

*See Lien 7.*

**Loss of logs by storm—Liability.**

*See Pond Keeper.*

### C STOM DUTIES.

**1- British North America Act—Foreign goods—Onus probandi.;**

Certain liquors manufactured in Ontario, prior to July, 1867, warehoused for exportation, and having paid no excise duty, were exported to Portland, U. S., where they were landed and immediately exported to St. John, N.B., where they arrived after the British North America Act came in force, being under the control of the customs authorities during the whole period of transit until they left Portland. *Held*, That by passing through the United States they did not become foreign goods, and were entitled to be admitted free of duty under the 121st section of the British North America Act. That coming from a foreign country they were *prima facie* foreign goods, and the burden of proving that they were not so, to the reasonable satisfaction of the Custom House authorities, was on the importer. *Kinnear and another v. Robinson*, 1 Hun. 559.

**2—Lumber—Defence in action for penalty.**

Where the proper steps have not been taken to obtain exemption of the duty imposed by the Act of Assembly 7 Vic. cap. 18, on lumber shipped for exportation after the 1st May, 1844, it cannot be set up as a defence to an action for the penalty imposed on shippers who omit to give the requisite bond for such duty, that the lumber would have been free from duty had the proper steps been taken to obtain exemption. *Watson v. Marks*, 2 Kerr 694.

**3—Forfeiture of goods.**

An entry at the Custom House declared that the packages contained articles not subject to duty; but some of them contained contraband goods. *Held*, That it was but one entry, and that being false as to some of the packages, the goods were not duly entered, and the whole were forfeited under 1 Rev. Stat. cap. 27, sec. 10. *Reg. v. Six barrels of hams*, 3 All. 387.

**COURTESY.**

*See* Tenant by Courtesy.

**DAM.**

*See* Mill Dam.

Assumpsit.

Covenant.

Negligence.

Damages.

Waste.

Action on the case.

**Erection of Dam in Stream Capable of Being used as a Highway—Persons Not Injured Have no Right to Destroy Dam—Injunction to Restrain.**

*See* Water Course.

**DAMAGES.**

I. PRINCIPLES. RECOVERY.

II. EVIDENCE.

III. PLEADING.

IV. DEFAULT.

V. SETTING ASIDE ASSESSMENT.

VI. EXCESSIVE.

VII. MISCELLANEOUS.

**II.****PRINCIPLES—RECOVERY.**

**1 Action on the Case—Waste—Damages Confined to Actual Injury—Tenant in Common—Proportion.**

In an action on the case for waste by one tenant in com-

mon against his co-tenant, the damage must be confined to the actual injury done to the premises, and to such portion thereof as the plaintiff's undivided share bears to the whole estate. *Linton v. Wilton*, 1 Kerr 223.

### **2—Erection of Dam—Overflowing Land.**

A., the owner of land through which a river flows, is entitled to recover damages in an action on the case from B., the owner of the land adjoining, situate lower down the stream, for erecting a mill-dam upon his own land, which caused the water to flow back upon A.'s land. *Smith v. Scott*, 1 Kerr 1.

### **3—Obstructing River—Corresponding Advantages.**

In an action for obstructing a river by erecting a mill-dam, it is not a proper question for the jury, whether the benefit derived by the public from the mill is sufficient to outweigh the inconveniences occasioned by the dam. *Rowe v. Titus* 1 All. 326.

### **4—Sterling and Currency.**

In an action brought in this Province for the value of goods sold and delivered in England, the plaintiff is entitled to recover such a sum in currency as will be equivalent to the demand in sterling money, according to the rate of exchange at the time of trial. (*See* Currency and Sterling.) *Campbell v. Wilson*, Ber. 265.

5—Such allowance recoverable under Common Counts, without specific averment of contract in sterling money, or statement of relative value of money, this matter of evidence. *Campbell v. Wilton*, Ber. 265.

### **6—Trespass—Several Defendants.**

In trespass against several defendants, two of them left when forbidden by the plaintiff, and took no part in the subsequent acts of trespass; the plaintiff's counsel elected to go against all the defendants for the trespass. *Held*, That the damages were properly confined to such trespasses as were committed when all the defendants were upon the land. *McMillan v. Fairley*, Han. 325.

**7—Failure on Delivery—Fall in Market Price.**

In an action for the wrongful detention of timber, the plaintiff is entitled to damages for a loss sustained by reason of a fall in the market, between time when the timber should have been delivered to him, and the time he received it. *Godard v. Fredericton Boom Co.*, 1 *Han.* 536.

**8—Detention of Alcohol—Measure of Damages.**

In an action for wrongfully detaining a quantity of alcohol belonging to plaintiff from September, 1867, till May following, when it was delivered to plaintiff, short 408 gallons; the proper measure of damages is—interest on the value of the alcohol during its detention, the value of the 408 gallons short, with interest from September, 1867, and any depreciation in the value of the alcohol during its detention. *Kinnear v. Robinson*, 2 *Han.* 73.

**9—Injury to Business—Agreement to Assign Judgments, etc.**

In an action for a breach of a contract to assign to the plaintiff certain judgments and mortgages upon his property, he cannot recover damages for injury done to his business and credit in consequence of the sale of his property under a decree in a suit for the foreclosure of the mortgage. *Gilbert v. Campbell*, 1 *Han.* 471.

**10—Wrongful Taking of Goods—Measure of Damages.**

Where the plaintiff has the immediate right to the possession of goods, the proper measure of damages in an action against the sheriff for wrongfully taking them is, the value of the goods at the time of the conversion, though they were taken under an execution against a person who had performed labor upon them, and for which the plaintiff would be bound to account to such person. *Rankin v. Mitchell*, 1 *Han.* 495.

**11—Disabling from Performance—Deduction of Money—Breach of Agreement to Convey—Cross Action.**

In an action for breach of an agreement to convey property to the plaintiff on payment of a sum of money by

instalments, and which agreement the defendant had disabled himself from performing before the last instalment was due; the plaintiff not having paid the last instalment, cannot recover it as damages for breach of the agreement; being part of the same contract, the defendant is entitled to have the unpaid instalment deducted from the damages, and is not driven to bring a cross action for it. *Gilbert v. Campbell*, 2 *Han.* 55.

**12—Escape—Final Process—Debtor Returning to Custody.**

If a prisoner in execution on final process escapes, and afterwards returns into custody, the proper measure of damages is not necessarily the whole debt, but such sum as the jury think the detention of the debtor's would have been worth during his absence. If there is no actual loss proved, the plaintiff is entitled to nominal damages *Kelly v. Jones* 2 *All.* 465.

**12a—Mesne Process.**

Plaintiff cannot recover unless he has sustained actual damage or delay of his suit thereby. *Atkinson v. Mitchell* 6 *All.* 345.

**13—Mesne Process—Sheriff not Arresting.**

Sheriff not liable for neglecting to arrest on mesne process, unless some damage sustained by his neglect. *Curran Beckwith*, 3 *All.* 365.

**14—Limit Bond—Rule of Damages—Execution.**

Damages may be assessed by a jury, and the proper rule of damages where the bond has been taken from a person in custody under execution, is the amount of such execution. (See Limit Bond.) *McKenzie v. Marsh*, 2 *Kerr* 629.

**15—Master and Servant—Entire Contract.**

The defendant agreed to employ the plaintiff for three years at an annual salary, commencing on the 1st April, 1848, but dismissed him without sufficient cause before the end of the second year. *Held*, That the plaintiff had an immediate right of action for breach of the agreement, in

which he was entitled to recover damages for the loss sustained by the breach of the entire contract, and was not limited to the sum due at the time of his dismissal. *Meade v. Doherty*, 2 All. 195.

**16—Tenant in Common—Sale of Goods.**

In case of sale of goods by one tenant, his co-tenant may affirm the contract and sue the former in assumpsit for his share; in such case the produce of sale would be the measure of damages. *See Doyle v. Taylor*, Ber. 201.

**17—Replevin—Plea Non Cepit.**

The defendant in replevin is entitled to damages on a verdict in his favor on the plea of *non cepit* if he gives such evidence as would have supported an avowry under the former law. *See Pleading II.* 28.

**18—Interest—Instalment—Act Silent as to.**

Interest not allowed on the instalment in assessment of damages. *See Interest 2.*

**19—Illegal Exaction of Duty—Interest not Recoverable on Money Paid, as Damages.**

*See Interest 1.*

**20—Covenant to Pay for Improvements—Appraised Amount—Interest Recoverable on.**

*See Landlord and Tenant VI.* 2.

**21—Nuisance—Owner of House not in Actual Occupation.**

The owner of a house of which he is not in the actual occupation, may recover from a person who has placed an offensive nuisance on adjoining premises, damages for the injury sustained in not being able to let the house advantageously in consequence of the nuisance. An owner is liable if he let a building which required particular care to prevent the occupation from being a nuisance, and the nuisance occurs for want of such care on the part of the tenant. *Smith v. Humbert*, 2 Kerr 602.



**22—Trove for Bill of Exchange—Non-fulfilment of Agreement.**

An action by the payee against the drawer of a bill of exchange was discontinued on the terms of the acceptor placing the amount of the bill to the payee's credit with a third person; and on the acceptor's representation that this had been done, the bill was given up to him. *Held*, in an action of trove for the bill against the acceptor—(the amount not having been placed to the payee's credit)—That it might be presumed, under the circumstances, that the payee had given notice of dishonour to the drawer, and that the plaintiff was entitled as damages to the value of the bill at the time of the conversion, which, *prima facie*, was the amount of the bill. *McDonld v. Everitt*, 3 *Kerr* 569.

**23—Revocation of Arbitration Bond—Award.**

Where arbitrators, after a revocation, make an award which is otherwise unimpeached, the amount awarded is a proper measure of damages in an action on the arbitration bond. *Hatheway v. Cliff*, 2 *All.* 267.

**24—Mesne Profits—Costs.**

As a general rule, the plaintiff, after judgment against casual ejector, is entitled to recover the costs thereof as part of the damages in an action for *mesne* profits. (See II. 7.) *Doe v. Dobson*, 2 *All.* 446.

**25—Counsel Fees.**

The plaintiff in replevin cannot recover as part of his damages, an amount paid to counsel on the execution of a writ *de proprietate probanda* issued on a claim to the property put in by the defendant. *Davis v. Cushing*, 5 *All.* 393.

Neither can he recover a sum paid for boomage while the timber was in charge of a Boom Company where it was placed for survey and safe keeping. *Ibid.*

**26**——Substantial damages may be recovered in replevin, though no special damage is alleged in the declaration. (Per N. Parker, J., special damage should be alleged.) *Firth v. Fitzgerald*, *Hil. T.*, 1866.

**27—Tort—Actual Damage—Jury not Limited to.**

In actions of tort, the jury are not limited to the actual damage sustained by the plaintiff; therefore, where the actual damage was only \$2, and the jury gave a verdict for \$40, it was held not excessive. *Rose v. Belyea*, 1 *Han.* 109.

**28—Bill of Exchange—Damages.**

*Semble*, That the acceptor of a protested bill of exchange drawn in this Province, and accepted payable in England, is not liable to 10 per cent. damages under 1 Rev. Stat. cap. 116, in an action brought here. *Morrison v. Spurr*, *All.* 288.

**29—Vendor—Sum Agreed to be Paid for Land by Vendee.**

In an action by a vendor, for breach of an agreement to purchase land, the plaintiff cannot recover as part of his damages the sum which the defendant had agreed to pay for the land. *Pugsley v. Gillespie*, 1 *Pug.* 195.

**30—Subsequent Neglect—Damage to Land.**

A stream diverted into a new channel by the Commissioners of the European and North American Railway, under 19 Vic. cap. 17, became obstructed in consequence of the new channel filling up and overflowing plaintiff's land. *Held*, 1st. That the Commissioners were bound to keep the channel open, and were liable to an action for the damage to the plaintiff's land. 2nd. That the fact of the plaintiff having been paid by the Commissioners, land damages for the diversion of the stream, was no bar to his recovering damages for their subsequent neglect to keep the channel open. *McLeod v. Commissioners of E. and N. A. Railway*, 1 *Han.* 574.

**31—Exemplary Damages—Wilful Act—Wrongful Intent.**

In an action on the case for pulling down a house, and thereby preventing a Sheriff from executing a writ of restitution awarded under 1 Rev. Stat. cap. 126, the jury may give exemplary damages if the defendant has acted wil-

fully, and with a determination to prevent the process of the law from being executed. *See Emblen v. Myers*, 6 H. & N. 54. (*Allenach v. Desbrisay, East. T.* 1865.

**32—Special Damage—Necessity of Statement in Declaration.**

In replevin for iron, the plaintiff cannot recover for loss sustained by not being able to get the iron at a certain time, for the purpose of manufacturing it, unless such special damage is alleged in the declaration, *Domville v. Keeran, East. T.* 1871.

**33—Carrier—Loss of baggage.**

The plaintiff, being a passenger on the defendant's railway, gave his baggage in charge of their servants. The baggage having been lost, the plaintiff sued for the value of the articles, and damage sustained in consequence of such loss, both in expense incurred thereby and loss of time. *Held*, That the damage must be confined to reasonable expenses of searching for the baggage, such as telegraphing, cab hire in going to the defendant's office, &c. *Morrison v. E. & N. A. Ry. Co.*, 2 *Pug.* 295.

**Action against carrier for loss of goods—Damage confined to proof of value of goods actually proved to have been contained in the case of goods lost.**

*See Evidence XI. 45. Smith v. Lunt.*

**34—Costs of previous action.**

Where costs are incurred in an action which plaintiff was not justified in bringing, and the payment of which was not the necessary result of the defendant's breach of contract, they cannot be recovered. *Deveber v. Roop*, 3 *Pug.* 295.

**Damages which might have been recovered in previous action—Remoteness of damages.**

*See Infra III. 2.*

**35 — Slander — Damages natural consequenc— Allegation.**

To maintain an action of slander of title, the words

must be followed as a natural and legal consequence by a pecuniary damage to the plaintiff, which must be specially alleged and proved ; there must also be an express allegation of some particular damage resulting to plaintiff from such slander. *Gordon v. McGibbon*, 3 *Pug.* 49.

**36—Safe keeping of property—Sheriff's expenses—Replevin.**

Expenses paid to the Sheriff in connection with the safe keeping of property replevied, are recoverable as damages. *McGowan v. Balls*, 2 *Pug.* 90.

**Two takings of property.**

In replevin, where the plaintiff complains only of the last taking, he cannot recover as he might in trespass, for damages consequent on a first taking, even when the first was illegal, or the defendant's subsequent conduct was such as would make him a trespasser *ab initio*. *Ibid.*

**37—Breach of agreement—Extra costs of hands and skilled labour.**

In an action brought by plaintiff against defendant for breach of agreement, not to go into business for a certain time, by reason of which breach, plaintiff claimed he had been compelled to pay a higher rate of wages, and also that a number of his workmen had gone to the defendant, it was *Held*, That the plaintiff was entitled to recover reasonable damages for extra cost of hands and loss by skilled labour leaving plaintiff and going to defendant, and that \$469 were not excessive damages. *Whittaker v. Welsh*, 2 *Pug.* 436.

**38—Illegal distress—Selling goods under.**

In trespass for seizing and selling goods under an illegal distress, the plaintiff may recover not only the value of the goods distrained and sold, but also damages for being deprived of the use of them, if thereby he is thrown out of employment, and in estimating the damages, the jury have a right to take into consideration the circumstances in which the plaintiff was placed, and the diffi-

culty of obtaining employment in his trade without tools, taken on illegal distress. *Rulley v. McMinn*, 2 *Pug.* 870.

### **39—Obstructing plaintiff's lights.**

In an action for obstructing the plaintiff's lights, a fair measure of damages of the cost of making such alterations in the plaintiff's house as will be necessary to obtain the same quantity of light and air as he had enjoyed before the obstruction. *King v. Pugsley*, 2 *P. & B.* 808.

### **Land damages—Subsequent damage.**

See Assessment I. 10, 11.

### **Splitting up claim for.**

A party cannot split up his claim for damages and proceed for a part of the trespass at one time, and part at another. See Trespass III. 5.

### **Reducing damages by claim of general average.**

See Shipping Law 17. *Burpee v. Carvill*.

## **II.**

### **EVIDENCE.**

#### **1—In reduction—Mitigation.**

In an action for breach of a written contract, whereby defendant, in consideration of £500 paid to him by the plaintiffs, agreed to convey to plaintiff a mill at P., as soon as he obtained a grant thereof. *Held*, (Chipman, C. J., *dissentiente*,) That defendant could not shew in reduction of damages that at the time the agreement was entered into, he had delivered a quantity of logs to the plaintiffs as a part of the consideration for the bargain. *Smith v. Mil-lidge*, 2 *Kerr* 408.

#### **2—Warranty—Price—Unsoundness.**

In an action for the price of fish, warranted sound, the defendant may give the unsoundness of the fish in evidence in mitigation of damages, and is not obliged to resort to an action on the warranty. *Smith v. Dunham*, 2 *Kerr* 630.

#### **3—Slander—Character of plaintiff.**

In an action of slander for charging the plaintiff with stealing, evidence of the general bad character of the plain-

tiff is not admissible in mitigation of damages. *Williston v. Smith*, 3 *Kerr* 448.

**4—Plaintiff's negligence—Destruction of third person's property by—For which defendant liable.**

In an action for work and labour in unloading a ship, the defendant cannot give evidence in reduction of the contract price, of the value of property in the ship belonging to a third person, which was destroyed by the plaintiff's negligence in discharging the cargo, and for which the defendant would be liable to the owner of the property. *Wilson v. Jarvis*, 3 *Kerr* 671.

**5—Special damage—Allegation—Admissibility.**

Evidence of special damage in not being able to fulfil a contract for the delivery of logs, is not admissible under an allegation in the declaration that the plaintiff was prevented by the act of the defendant from getting the logs to market, and thereby lost the freight and sale thereof. *Rowe v. Titus*, 1 *All.* 326.

**6—Expense of attending before Sheriff's jury.**

In trespass for taking goods, the expense of attending before a jury called by the sheriff to inquire into the right of property, is not evidence under an allegation of special damage by reason of loss of time, etc., in regaining the possession; and *Quere*, Whether it would be evidence in any case. (See 2 *Han.* *Mercer v. Cosman.*) *Wilson v. Ellis*, *Ber.* 324.

**7—Mesne profits—Taxed costs—Payment must be shewn**

Where the declaration, in an action for *mesne* profits alleged that the plaintiff was obliged to, and did necessarily lay out and expend a large sum of money in recovering the possession of the land, he cannot recover, as part of the damages, the costs of the judgment by default in the ejectment, on the mere production of the taxed bill of costs, without proof of payment. *Doe v. Cahill*, 2 *All.* 650.

**8—Bail bond—Assignee of—Evidence.**

In an action by the assignee of a bail bond, when the

only plea is *non est factum*, the plaintiff need not give any evidence of the original cause of action; but on proof of the execution of the bond, he is entitled to a verdict with nominal damages, and if the execution issues for more than the debt due and costs, the defendant may be relieved by application to the Court. *See* I. 14. (*See* Bond—Limit Bond.) *Scribner v. Gibbon*, 4 All. 182.

**9—Admission—Action against sheriff.**

*Quere*, Whether in an action against the sheriff for an escape, evidence of the admission of the judgment debtor of his ability to pay the debt was properly rejected. *See Kelly v. Jones*, 2 All. 465.

**10—Nuisance—Erection of steam mill.**

The evidence of persons living in other adjoining premises as to the injurious effect of the steam mill upon them is admissible, in order to shew by necessary inference the damage done to the plaintiff by the erection. No other damage need be shewn than the abridgment of the plaintiff's enjoyment in the occupation of his premises. *Barlow v. Kinnear*, 2 Kerr 94.

**11—Notice of action—Statement.**

Where special damage is claimed in consequence of an unlawful imprisonment by a Justice of the Peace, *e. g.*, the cost of obtaining the plaintiff's discharge from prison, it should be stated in the notice of action, otherwise evidence cannot be given of it. *Sewall v. Olive*, 4 All. 394.

**12—Affidavit—Legal proof of debt.**

In assessing damages under the Act after judgment by default, the plaintiff must establish the amount of his debt or damages by legal proof. Where the only evidence of the debt was an account shewing several sums of money due from the defendant to the plaintiff on various transactions with an affidavit of the plaintiff that the "account was just and true," it was held insufficient, and the judgment was set aside. *Mitchell v. Lawther*, 1 Pug. 79.

## III.

## PLEADING.

**1—Statute of limitations—Limiting recovery.**

In an action on the case for overflowing plaintiff's land by a dam, erected more than six years before bringing the action—*Held*, That the effect of the plea of the Statute of Limitations was not to bar the action, but to limit the recovery of damages to six years. *Connors v. McLaggan*, 2 *Kerr* 446.

**2—Detention of lumber—Subsequent replevy by plaintiff—Damages too remote.**

In an action for wrongfully detaining the plaintiff's timber, in which the declaration stated that, by reason of the detention, the plaintiff was prevented from manufacturing the lumber, and lost the sale of it, and his saw-mill was kept idle; it is no answer to the plaintiff's claim for damages that after the alleged detention the defendants had placed the lumber in the hands of T., from whom the plaintiff replevied it; the damages claimed in this action being anterior to the time when the lumber was placed in T.'s hands. But the plaintiff is not entitled to damages for any depreciation in the value of the lumber subsequent to the delivery to T., as such damages might have been recovered in the action against him; nor to damages for the loss of the use of the mill, they being too remote and not a necessary consequence of the detention of the lumber. That P. having put in a claim of property when the lumber was replevied from J., and that claim having been found against him on a writ *de. prop. prob.*, and afterwards on a plea of property in the action of replevin, could not set up property in the lumber in this action. *Godard v. Fred. Boom Co.*, 6 *All.* 448.

## IV.

## DEFAULT.

*See Practice V. VI.*

Where damages had been assessed on an account by a Judge



at Chambers, but the affidavit on which it was made did not support all the items of the account, the Court reduced the damages to the amount warranted by the affidavit. *Scoullan v. Webb*, 1 Kerr 520.

*See* Judgment by Default.—Offer to suffer judgment.

## V.

### SETTING ASIDE ASSESSMENT OF DAMAGES.

1 ————It is no ground for setting aside the assessment on a writ of inquiry executed at the Assizes, that the Sheriff has not returned any panel on the writ, and the damages have been assessed by the jury summoned to try the issues at the Assizes. *Wheeler v. Goss*, 1 Kerr 580.

2 ————Where, on a writ of inquiry before a Sheriff's jury to assess damages for the wrongful detention of liquor from September, 1867, till May following, the plaintiff gave evidence of transactions respecting the liquor prior to September, and also the expense of warehousing, insurance, and legal expenses, and no rule was laid down by the Sheriff for the guidance of the jury as to the measure of damages, the Court set aside the assessment, being unable to ascertain by the evidence how the jury arrived at the amount. *Kinnear v. Robinson* 2 Han. 78.

## VI.

### EXCESSIVE.

*See* Supra I. 27.

New Trial II. 84, III. 13, 14, 16, 17, 18.

Malicious Arrest, etc. 7.

### Action of Tort.

In actions of tort, the mere fact of the damages being high, and more than the Court would have given, is not a sufficient ground for disturbing the verdict. *Brewing v. Berryman*, 2 Pug. 515.

## VII.

### MISCELLANEOUS.

**Good and Bad Counts—Evidence on Trial Applicable to Good Counts, no Inference that Damages were Given on Bad Counts.**

*See* Amendment III. 5.

**Assumpsit—Breach of Agreement—Non-Suspension of Action—Liquidated Damage.**

*See Assumpsit I. 1.*

**Damages too Remote.**

*See Covenant 10.*

**Breach of Covenant, and damage arising in lifetime of Testator, Action should be brought in name of Executor.**

*See Cunningham v. Scoullar, 4 All. 385.*

**Conflicting Evidence—Damages large—Verdict not disturbed.**

*See New Trial III. 17.*

**Highway—Jury Assessing, on view of land where no witnesses produced.**

*See Ex parte Hebert, 3 All. 108.*

*See Highways 20.*

**Jury not confined to value of land merely.**

*See Highways 26.*

**Mandamus, requiring appraisers to assess damages.**

*See Mandamus 6.*

**Private road—Presence of Justices.**

*See Assessment III. 5.*

**Apportionment of damages—Trespass on two distinct lots of land.**

*See Trespass IV. 6.*

**Nominal damages—Question fairly left to jury.**

*See New Trial III. 18 a.*

**Note payable in specific articles.**

*Quære* Whether plaintiff can declare for special damage for not delivering articles. *See Bills and Notes I. 13.*

**Liquidated damages—Claim for, provable under Bankruptcy.**

*See Bankruptcy.*

**Writ of Injury—Assessing damages on second writ held regular where jury gave no verdict, and were dismissed.**

*See Ward v. Dow, Ber. 21.*

**Assessment by Jury—Limit Bond.**

*See Venire—Assessment—Practice—Judgment by Default—Contract—Replevin.*

**Interest—Unliquidated damages—Judgment delayed**

In an action on the case for unliquidated damages, the jury included interest in the verdict. *Held*, on an application for allowance of interest from time of verdict to judgment, That interest was improperly included, and the application was refused. *Burpee v. Carvill*, 3 Pug. 285.

**Replevin—Damages recoverable in action.**

*See Replevin.*

**Jury not bound to give damages under 1 Rev. Stat. cap. 126, sec. 16.**

*See Replevin 25.*

**Breach of contract for delivery of logs—Measure of damages.**

*See Contract 26. West v. Rutledge.*

**Traversing allegations of special damage—When cannot be done.**

*See Bond C. Wheeler v. Stewart.*

**Defendant claiming to reduce damages by claim for general average.**

*See Shipping Law 17. Burpee v. Carvill.*

**Reducing verdict—Party has no right to fix damages himself, but should apply to Court to ascertain amount.**

*See Practice VI. 52. Steeves v. Wilson.*

**Insurance—Partial loss—Want of evidence as to loss**

*See Insurance. Wood v. Slymest.*

**Intrusion**

*Quære*, Whether damages can be recovered in an information for intrusion unless they are alleged in the information. *Reg. v. Taylor*, 5 All. 242.

**School teacher—Dismissal of if guilty of misconduct, but not legally dismissed by the trustees.**

*Semble*, That he could only recover nominal damages. *See Connor v. Wiggins*, 5 All. 185.

**When necessary to state damage with particularity—Evidence confined to damage stated.**

*See Evidence III. 28. Mullis v. Rose.*

**Refusal to deliver goods—Principal and agent—Adoption of acts of agent—Liability of principal for all of goods ordered.**

*See Principal and Agent 20. Lucy v. Donovan.*

**Charter party—Delay in loading vessel.**

*See Shipping Law 18. Schofield v. Gibson.*

**DEBT.****1—Action—Sheriff.**

Action of debt will not lie by a sheriff on a limit bond, when he had received the prisoner into close custody after taking the bond. *See Campbell v. Henan Ber.* 78.

Action of debt against a sheriff for an escape cannot be maintained in this Province under the Statute 1 Rich. II. cap. 12, which is not applicable to this Province. *Wilson v. Jones*, 1 All. 658.

**2—Legacy—Termination of trust—Action by legatee.**

*See Action at Law IX. 16.*

**3—Legatee.**

A legatee may maintain an action of debt against an executor for a certain legacy given by his testator. *Ibid.*

**4—Bequest—Defence—Property unsold.**

A bequest by a debtor to his creditor of a legacy to the amount of the debt, payable out of the proceeds of certain property which remains unsold, is no defence to an action by the creditor for his debt. *See Bishop v. Robinson*, 1 Han. 68.

**DEBTOR.**

*See* Insolvent Debtor.

**Discharge of—At suit of executor—Persons beneficially interested agreeing to release**

*See* Discharge.

**Discharge of defendant by one of several plaintiffs.**

*See* Discharge.

**By consent of plaintiff—Remedy on judgment**

*See* Discharge.

**Refusal to discharge—Equitable satisfaction.**

*See* Action at Law IX. 1.

**DECK LOAD.**

**Loss by jettison—Contribution—Liability of master of ship for loss.**

*See* Shipping Law.

**DECEIT.**

*See* Warranty.

**DECLARATION.**

*See* Pleading.

Practice.

**DECREE.**

*See* Supreme Court in Equity.

**DEDICATION.****1—Of highway—Presumption.**

Dedication of a road to the public may be presumed from long user and the expenditure of statute labour on the road, and a party may be convicted under the Act 5 Wm. IV. cap. 2, sec. 16, for encroaching on such a road as well as upon highways duly laid out under the Act. *Reg. v. Buchanan*, 3 Kerr 674.

**2—**A public highway may be established in this country by dedication and user. *See* Highways 16.

**By Crown—Presumptive evidence**

*See* Highways 30.

**DEED.**

- I. DEED.
- II. VOLUNTARY CONVEYANCE.
- III. TRUST DEED.
- IV. COMPOSITION DEED.
- V. MISCELLANEOUS.

## I.

**DEED.****1—Registry—Relation.**

A deed, when registered under the Act of Assembly 26 Geo. III. cap. 3, conveys the estate by relation from the time of the delivery of the deed, when there is no *mesne* incumbrance which has obtained a priority. *Doe dem. Bridges v. Quint, East. T.*, 1828.

**2—Adverse possession—Registry not giving possession.**

A deed registered under the Act 26 Geo. III. cap. 3, will not enure to give possession to the grantee, so as to enable him to maintain trespass against a person in the actual adverse possession of the land, and who took possession subsequent to the registry of the deed and the entry of the plaintiff under it, and continued such possession for several years before the alleged trespass. *Dunham v. King, Trin. T.* 1831.

**3—Words “remise, release and quit claim”—Execution, acknowledgment and registry—Good deed.**

A deed, whereby the grantor, for valuable consideration, did “remise, release and quit claim” to the grantee, his heirs and assigns, all his right, title and interest in certain described lands, having been duly executed, acknowledged and registered, pursuant to the Act 26 Geo. III. cap. 3, is a good conveyance of land, within the meaning of the 10th section of the Act. *Doe dem. Wilt v. Jardine, Bert.* 142.

**4—Statute of Uses and Enrolments in force.**

The Statute of Uses, 27 Hen. VIII. cap. 10, and the

Statute of Enrolments, 27 Hen. VIII. cap. 16, extend to, and are in force in this Province; therefore, a deed of bargain and sale, not enrolled according to the provisions of the latter Statute, nor registered according to the Provincial Act 26 Geo. III. cap. 3, does not pass any estate to the bargainee. *Doe dem. Hanington v. McFadden*, Bert. 153

**5—Words, privileges and appurtenances, etc.—Right to use stream.**

A deed by which a grantor conveys a certain piece of land, "together with the saw-mill thereon, with all and singular the privileges and appurtenances belonging thereto; together with the mill-pond, mill-dam, and any other privilege connected with, or belonging to the said premises," does not convey a right to use a stream flowing through the grantor's land, for the purpose of taking logs to and from the mill, though the grantor had used the stream for that purpose previous to the deed. *Rogers v. Peck*, Bert. 818.

**6—Grantor disseised—No estate passing.**

If, at the time of the execution of a conveyance of land, the grantor is actually disseised, no estate passes to the grantee. *Doe dem. Thomson v. Barnes*, Bert. 426.

**7—Deed destroyed—Evidence—Feoffment.**

Where the only evidence of the contents of a deed destroyed many years ago, and under which the plaintiff claimed title, was that of witnesses who had read it, and heard it read; and who stated that it was a deed of the land in dispute, from A. P., the grantee, to his daughter, R. E., (one of the lessors of the plaintiff,) of the land where she lived, either sixty or eighty rods; that the names of A. P. and his wife were signed to it; that it bore date some time in the last century, and was to R. E., her heirs and assigns forever. *Held*, That sufficient did not appear to enable the Judge to direct the jury that it was a deed of feoffment, or to determine its legal operation. *Doe dem. Edgett v. Stiles*, 1 Kerr 338.

**8—Execution—Proof of.**

The execution of a deed of conveyance is not proved by the magistrate's certificate of acknowledgment indorsed, without the certificate of registry. *Joplin v. Johnson*, 2 Kerr 541.

**9—Identity of lot.**

Where the description in a deed designated the lot by number, and referred to an inventory, which was not produced—*Held*, That there being sufficient evidence from the other part of the description of the identity of the lot to go to the jury, the deed was sufficient. *McEachern v. Ferguson*, 3 Kerr 242.

**10—No memorandum of acknowledgment.**

Where a certified copy of a deed tendered in evidence under the Act 7 Wm. IV. cap. 15, contained no memorandum by the Justice of the acknowledgment of the due execution of the deed, according to the Act 26 Geo. III. cap. 3. *Held*, That the deed was not duly registered. *Doe dem. Lyons v. Slavin*, 3 Kerr 258.

**11—Valuable consideration—Inequality of value.**

In order to constitute a valuable consideration to support a conveyance, it is not necessary that the money paid should be of equal value with the property conveyed, provided the transaction is *bona fide*. *Payson v. Good*, 3 Kerr 272.

**12—Acknowledgment—Proof of person taking, being a Justice of the Peace.**

Where the memorandum of acknowledgment, endorsed on a registered deed, was subscribed, "Josephus Moore, J. Peace," but did not state in the body of it, that he was a Justice of the Peace for the county; he was allowed to be called as a witness to prove that he was so. *Robinson v. Wilson*, 3 Kerr 301.

**13—Acknowledgment before Deputy Mayor.**

A deed acknowledged before a Deputy Mayor of a borough in Great Britain, with the common seal of the borough affixed, is a sufficient acknowledgment under the Act 52 Geo. III. cap. 20. *Blair v. Armour*, 3 Kerr 341.



**14—Subscribing witness—Proof by.**

A power of attorney, proved by the oath of a subscribing witness before a competent authority in Ireland, is sufficient under the Act 52 Geo. III. cap. 20; it need not be acknowledged by the person executing it. *Maloney v. Purdon*, 3 Kerr, 515.

**15—Certificate of proof—Signature—Judicial notice.**

Where the certificate of proof of the execution of a deed was subscribed "Geo. D. Ludlow," without any description of his official character, either in the certificate or annexed to his signature. *Held*, (Carter, J., *dissentiente*,) That the Court would take judicial notice that a person named George D. Ludlow was Chief Justice of the Province at the time the deed appeared to have been executed; and that it was competent for the Registrar of Deeds to recognize the certificate as an authentic act of the Chief Justice. *Watson v. Hay*, 3 Kerr 559.

**16—Escrow—Need not be by express words.**

It is not necessary that the delivery of a deed as an escrow should be by express words, though it is in form an absolute delivery; yet, if from the circumstances attending the execution, it can reasonably be inferred that the delivery was only conditional, it will operate as an escrow. *Keator v. Scovil*, 3 Kerr 647.

**17—Foreclosure — Master in Chancery— Evidence of proceedings.**

The deed of a Master in Chancery, purporting to be made in pursuance of a decree of foreclosure, duly registered, is evidence that all the proceedings on which it is founded were rightly done, without producing the decree. *Jarvis v. Edgett*, 1 Allen 66.

**18—Words "adjacent and adjoining."**

*Semble*, That there is no distinction between the words "adjacent" and "adjoining," used in the description of the property in a deed. *Doe dem. Lunn v. Pitt*, 1 Allen 385.

**19—Witness deceased—Absence of other — Proof of deed.**

A deed appeared to have been executed in the presence of two witnesses, one of whom, a Justice of the Peace, authorized to take acknowledgment of deeds, was dead; no account could be given of the other by persons who had the best means of obtaining knowledge of the inhabitants of the place where the deed was executed. *Held*, That it was properly received in evidence on proof of the handwriting of deceased witness. *Doe dem. Chubb v. Hatheway*, 2 *All.* 69.

**20 — Unregistered conveyance — Vendee in possession.**

An unregistered conveyance of land operates as a release, if the vendee is in possession at the time; if he takes possession immediately after, it may operate as a feoffment, as livery of seisin may be presumed after a long possession. *Doe dem. McKay v. Allen*, 2 *All.* 191.

**21—Easement—Soil not passing.**

A., the owner of a saw-mill to which a piling place was attached, conveyed the mill with "the privileges and appurtenances" thereto belonging: the purchaser ceased to use the piling place, as such, and built upon it. *Held*, That no title to the soil of the piling place passed by the deed; but only an easement as appurtenant to the mill, which ceased when the purchaser built upon the land. *Doe dem. Hil v. Todd*, 2 *All.* 261.

**21 a—Soil of mill-pond—Easement.**

A deed of a piece of land "together with the mill privilege, saw-mill and erections belonging to the same; and also "all the pond or flowage above the same mill," conveys no right to the soil of the mill-pond, but only an easement to dam the water and overflow the land for the purpose of the mill below. *Herbeson v. Cunningham*, 1 *Pug.* 235.

**22—Registry before proof—Inadmissibility in evidence.**

Where, by the certificate endorsed on a deed, it ap-

peared to have been registered before it was proved, it is not admissible in evidence as a registered deed by relation from time of proof. *Doe dem. Blair v. Rideout*, 3 All. 502.

**23—Two deeds on one sheet—One certificate of registry—Registry Book evidence.**

Where two deeds were written on the same sheet of paper, and registered at the same time, but only one certificate of registry and one number were endorsed, it may be proved by the Registry Book that both deeds were registered. *Doe dem. v. Kerr v. McCulley*, 3 All. 194.

*Quære*, Whether a proper certificate of registry could not be endorsed at the trial. *Ibid*.

**24—Affidavit endorsed on deed—Not evidence of death of Intestate—Evidence of due sale, etc.**

The affidavit endorsed on a deed purporting to be made by an administrator under license from the Probate Court, is not evidence of the death, or of the granting of administration; but only that the land has been duly advertised and sold. *Doe dem. Simpson v. Donoran*, 4 All. 116.

**25—Condition—Estate in possession—Immediate right of entry.**

A deed of land, subject to a condition that the grantor should receive and enjoy all the profits and emoluments accruing therefrom during his life, *habendum*, to the grantee, his heirs and assigns, with a general covenant of warranty, conveys an immediate estate in possession, and not an estate in remainder after the death of the grantor; and the grantee's right of entry accrues on the execution of the deed. *Doe dem. Baxter v. Baxter*, 4 All. 131.

**26—Conveyance from grantor to himself and others.**

A man cannot convey land to himself; therefore a deed of bargain and sale from B. to C., M. and himself, and their heirs being imperative as to B., vests the whole estate in C. and M. as joint tenants, and an action of trespass cannot be maintained by the three on such title. *Cameron v. Steves*, 4 All. 141.

**27—Preparation of conveyance—Vendor.**

It is the duty of the seller of land to prepare the conveyance ; and if he has a wife who would have a right of dower in the land in case she survived him, she should be a party to the conveyance. *Sweeney v. Godard*, 4 All. 800.

**28—Acknowledgment in Great Britain—Seal of Corporation.**

The acknowledgment of a deed in Great Britain was in the following form : “ Be it remembered that on, etc., before me, T. G., Mayor of the town of Southampton, in England, personally appeared, etc. Given under my hand and seal the day and year first above written,” and signed by the Mayor, with a seal affixed having the words “ Southampton Villa ” inscribed around what appeared to be the City arms. *Held*, That it imported to be the corporate seal of Southampton, and not the private seal of the Mayor, and therefore the acknowledgment was sufficient under the 1 Rev. Stat. cap. 112. *De Veber v. Britain*, 4 All. 830.

**29—Description—Whole lot passing.**

A deed of conveyance described the land, as a piece of land, “ *being lot number seven* ’ in the division of a certain property, and running from Crooked Creek, etc. *Held*, That the whole of lot No. 7 passed by the deed, though the line of the lot did not run from Crooked Creek. *Stiles v. Kiever*, 5 All. 285.

**30—Description in part inaccurate—Effect.**

When part of the description is inaccurate, effect is to be given to the description first in order, and to the name ; and a cumulative description, if it fails in point of accuracy, will be rejected. *Ibid*.

**31—Barrister's Deed—Sale—Immediate execution.**

The Equity Act (17 Vic. cap. 18), directs that on sales by a Barrister, he shall execute a conveyance of the land “ *immediately upon such sale.*” *Held*, That this meant without any improper delay ; and that three weeks after the sale was not an unreasonable time. *Doe dem. Jardine v. Coigley*, 5 All. 561.

**32—Consideration—Becoming bail.**

Becoming bail for the grantor, is a sufficiently valuable consideration to support a deed against a prior unregistered conveyance. *Crockford v. Equitable Insurance Co.*, 5 *All.* 651.

**33—Escrow—Delivery of deed.**

To make the delivery of a deed operate as an escrow, it must be delivered to a stranger,—not to the grantee. *Haggarty v. O'Leary*, 6 *All.* 860.

**34—No declaration of use—Consideration—Money blank.**

Under the Registry Act (1 Rev. Stat. cap. 112) a deed from A. to B., expressed to be “for and in consideration of the sum of — lawful money of the Province,” *habendum* to B., his heirs and assigns, but without any declaration of the use, is a sufficient conveyance of the land to B.

*Semble*, That it sufficiently appeared that the consideration of the deed was money, and the amount of consideration being unimportant, that the deed might operate either as a deed of bargain and sale or as a feoffment. *Wortman v. Ayles*, 1 *Han.* 63.

**35—Lunatic.**

The deed of a lunatic is not absolutely void, but voidable, and can only be avoided by the grantor or his representatives. *Doe dem. Hickman v. King*, 1 *Han.* 390.

**36—Date—Sheriff's deed—Affidavit differing.**

The date mentioned in a deed is not conclusive, and the actual date of the execution may be shewn. Where a sheriff's bore date in 1841, and the affidavit of the due advertising and sale was made in 1848—*Held*, That evidence was admissible to prove that the deed was executed at the time the affidavit was sworn. *Doe dem. Connell, v. Dickerson*, 1 *Han.* 456.

**37—Sheriff's deed—Date of deed and affidavit—Executing at same time.**

The affidavit of the sheriff under the Act 4 Wm. IV, cap.

22, of the duly signing and selling land taken in execution, must be made at the same time that the sheriff's deed is executed, and in the absence of evidence to the contrary, the deed must be presumed to have been executed on the day it bears date. Such an affidavit, purporting to have been sworn on the 2nd February, when the deed bore date on the 2nd January previous, is insufficient, there being no other proof of the time of the execution of the deed. *Doe dem. Bustin v. Donelly*, 3 Kerr 66.

**38—Fraud—Want of consideration—By whom may be set up.**

Fraud or want of consideration for a deed, can only be set up by the grantor or those claiming under him. *Hickman v. North British Insurance Company*, 2 Han. 285.

**39—Description—Rejection of part—Construction.**

D. conveyed to his daughter a piece of land in Saint John, described as "a lot on the corner of St. James and Sydney Streets, now in the occupation of P. M. and wife, (the defendants), subject to any charge or mortgage now against the same." At the time of making this conveyance, D., the grantor, owned parts of two lots, Nos. 1085 and 1086, adjoining each other, and purchased at different times. No. 1086 was situated on the corner of St. James and Sydney Streets, and was occupied by the grantor's daughter and her husband, P. M.; and was also subject to a mortgage given by the grantor. No. 1085 was situated altogether on St. James Street, and was occupied by tenants of D., who received the rents—his daughter only having the use of a wood-shed and out-house thereon, in common with the other tenants. *Held*, per Ritchie, C. J., Allen and Wetmore, J. J., That no part of the description in the deed could be rejected; that the lot No. 1086 exactly fitted and corresponded with the description in the deed, and therefore that lot only passed by the deed. Per Weldon and Fisher, J. J., That the words of the deed, coupled with the surrounding circumstances, shewed an intention to convey both lots to the defendant. *Doe dem Donaghue v. McGarrigle*, 1 Pug. 254.

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**40—Defendant's deed under sale by license of Probate Court—Objection to proceedings in Probate Court—Remedy by Appeal—Irregularity of proceedings cannot be objected to on trial—Deed cannot be avoided on trial.**

The lessors of the plaintiff claimed as devisees under the will of H. P.; the defendant claimed under a deed from H. P.'s executor, under a license from the Probate Court. The plaintiff contended that the license was void, because H. P. had left sufficient personal property to pay his debts, and that the executor had improperly expended large sums in costs in the Probate Court, in proceedings which he had no right to take; that he had acted fraudulently towards the estate; and that the defendant, who who had been his attorney in the proceedings in the Probate Court, was cognizant of the fraud of the executor, and had no right to purchase from him. A verdict having been found for the plaintiff—*Held*, on motion for a new trial, That though a large amount of costs appeared to have been unnecessarily incurred in the Probate Court, and the proceedings there were irregular, it did not avoid the defendant's deed; that the parties interested under the will should have appealed from the decree of the Probate Court, granting license to sell the real estate, and could not object to the regularity of the proceedings in this action. *Doe dem Sullivan v. Currey*, 1 Pug. 175.

**Fraudulent Conveyance—Resulting Trust—Equitable Estate.**

*See* Ejectment II. 10.

**41—Deed for Maintenance—Creditors—Coroner.**

P. and wife made a conveyance of the farm on which they lived, to their son, the plaintiff, the consideration being that the plaintiff would support them for the remainder of their lives. At the time of the execution of this deed the plaintiff was under age. A few days after the deed was given, judgment was signed against P. and wife, for the costs of a suit which they had previously brought against the Sheriff for levying, under an execution against P., property claimed by his wife. The land so conveyed

having been seized and sold under an execution issued against P., was purchased by S., by whose license the defendant had committed the acts complained of. An action being brought by the plaintiff against the defendant. *Held*, That the learned Judge was right in directing the jury that the deed from P. and wife was void as against their creditors. The Homestead Act, 31 Vic., cap. 25, would not affect the case, because no application was made by P. and his wife to the Sherriff to have a homestead set off, even if they had not precluded themselves from claiming the exemption by executing the deed to plaintiff. An execution directed to the "Coroners" of a County may be executed, and the land conveyed, by one. *Pourrier v. Harding*, 2 Pug. 120.

#### **42—Acknowledgment—Certificate of Registry—Extrinsic Evidence.**

A certified copy of deed recorded in 1885, was objected to on the ground that the acknowledgment, being taken before the Mayor of St. John, was insufficient, but the Court held that the Mayor, being *virtute officii* a Judge of the Common Pleas, had power to take acknowledgments; and also that it was not necessary it should appear to have been taken within the city or County of St. John. *Held* also, in the same case, that the certificate of the Registrar was sufficient, even though he did not certify that he was the Registrar of the County in which the land lay, or that the deed was registered in such County, and that it could be shown by extrinsic evidence that he was the Registrar of the County. *Doe dem. McKenzie v. Mosher*, 2 Pug. 355.

#### **43—Acknowledgment by Married Woman.**

A certificate of an acknowledgment by a married woman, stating that she "acknowledged that she signed, sealed and delivered the deed for the purposes therein mentioned; and being examined separate and apart from her husband, said that she did the same of her own free will and accord," is not sufficient to satisfy the requirements of the Act. 27 Geo. III., cap. 9. *Allison v. Smith*, 1 P. & B.



2————A. made a voluntary conveyance of land to the plaintiff, his infant son, but without any fraudulent intent; fourteen years afterwards, the defendant obtained a judgment against A., under which the land previously conveyed to the son was sold by the sheriff, and purchased by the defendant with notice of the prior conveyance. *Held*, per R. Parker, J. and Wilmot, J. (N. Parker, M. R., *dissentiente*), That under the Act of Assembly 26 Geo. III., cap. 12, sec. 5, the defendant was a purchaser for valuable consideration, in the same situation as if he had purchased from A., and therefore that the deed from A. to his son was fraudulent and void under the Statute 27 Eliz. cap. 4. *Held*, per N. Parker, M. R., 1st. That at the time of the judgment against A. he had no interest in the land which could be sold under the Act 26 Geo. III., cap. 12, and therefore the sheriff's deed to the defendant was a nullity. 2nd. That a purchaser at sheriff's sale was not such a purchaser as was contemplated by the Statute 27 Eliz. cap. 4. *Doe v. McCulley*, 3 All. 194.

————A., without any fraudulent intent, made a voluntary conveyance of land to the plaintiff, his infant son; fourteen years afterwards the defendant obtained judgment against A. in an action of *tort*, under which the land previously conveyed to the plaintiff was sold by the Sheriff, and purchased by the defendant with notice of the prior conveyance. *Held*, per Carter, C. J., Parker, J., and Wilmot, J., (N. Parker, M. R. and Ritchie, J., *dissentiente*), That under the Act of Assembly 26 Geo. III., cap. 12, sec. 5, the defendant was a purchaser for a valuable consideration, in the same situation as if he had purchased from A., and therefore the deed from A. to the plaintiff was fraudulent and void and under the Statute 27 Eliz. cap. 4. *Held*, per N. Parker, M. R., and Ritchie, J., 1st. That at the time of the judgment against A. he had a bare power of sale, and no estate in the land which could be seized under execution; and therefore that no interest passed to the defendant by the Sheriff's deed. 2nd. That to invalidate the plaintiff's deed, a second conveyance by A. for valuable

consideration was necessary. And per N. Parker, M. R., That the defendant was to be considered as a subsequent creditor of, and not as a purchaser from A., and therefore that the plaintiff's deed was good against him. *Doe v. McCulley*, 3 All. 508.

#### **4—Subsequent Creditor—Sheriff's Deed.**

A voluntary conveyance of land (without fraud) is good against a subsequent creditor claiming under a Sheriff's deed, since the 1 Rev. Stat. cap. 113. *Doe dem. Roup v. Trentowsky*, 5 All. 636.

In 1852, A., without valuable consideration, conveyed land to B. in trust to hold for the benefit of A.'s wife for life, and after his death to be divided among his children. In 1855, the lessor of the plaintiff obtained judgment against A. under which the land conveyed to B. was levied on by the Sheriff, and purchased by the lessor of the plaintiff in 1859. The defendant claimed under a lease from B. in 1857. *Held*, That the conveyance to B. was good, and that nothing passed by the Sheriff's deed. *Ibid*.

### III

#### TRUST DEED.

##### **1—Fraud—Execution of Deed—Intention.**

In trover for timber seized by the defendant, as Sheriff of Saint John, under a *fi. fa.*, issued against P. at the suit of S. & B., which timber was claimed by the plaintiffs, as trustees under a deed of assignment made by P. to them, expressed to be for the general benefit of the creditors, and executed just before the signing of a judgment in S. & B.'s suit, and the intent of which was to prevent his property being taken under the execution upon such judgment, the case went to the jury upon the question of fraud in the assignment, who found for the defendant. A new trial was granted on payment of costs, it appearing that P. was insolvent at the time of the assignment, that an actual delivery of the timber had been made to the plaintiffs before issuing the *fi. fa.*, and the evidence being insufficient in

the opinion of the Court to shew that the deed was not intended to be for the benefit of the creditors as expressed on the face of it. *Hayward v. White*, 2 Kerr 804.

The question in cases of this sort is whether the transaction is *bona fide*, and really what it purports to be—for the benefit of creditors—or a mere pretext or cover in order to protect the property for the benefit of the debtor. *Ibid.*

A condition in the trust deed that each trustee shall only be answerable for his own neglect or default, is not unusual or improper. *Ibid.*

It is not essential to the validity of a trust assignment for the benefit of creditors, that the creditors should be parties to the deed. *Ibid.*

### **2—Bona Fides—Question for Jury—Interference of Court—Insufficient evidence—Fraudulent clause.**

Although the *bona fides* of a trust deed, whereby the debtor's property is all assigned to trustees for the benefit, in the first instance, of certain preferred creditors, and afterwards for the benefit of all the creditors generally, is a question for the jury, and has been so left to them by the Judge, yet the Court will set aside the verdict, and grant a new trial, where the evidence does not appear sufficient to warrant the inference of fraud which the jury have drawn. *Burnham v. White*, 2 Kerr 571.

The question upon which the validity of the deed depends is whether the assignment was really intended to operate, as it purports to operate, for the benefit of creditors, or was merely colorable, and made to protect the property for the use of the debtor. *Ibid.*

A clause in the deed of assignment, whereby the trustees agree to become bail for the assignors in case they are arrested, or their security for the gaol limits, and are to be indemnified out of the trust property, is not fraudulent; such clause, though the terms are general, will be necessarily confined to arrests for debts existing at the time of the assignment. Neither is a clause, whereby the responsibility of each trustee is confined to his own acts or defaults, unusual or improper. *Ibid.*

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**3—Appointment of Trustees in case of death or discharge—Vesting of Estate.**

The Mayor, etc., of Saint John conveyed real estate to five persons, their heirs and assigns, upon certain trusts; and the deed declared that in case either of the trustees should die or be desirous of being discharged from, or become incapable to act in the trusts, it should be the duty of the other trustees for the time being, to call a general meeting of the creditors of the said mayor, etc., and that it should be lawful for a majority of the creditors present to nominate, substitute, and appoint any other person to be trustee in the place or in addition to the trustees thereby appointed, with the like powers to such new trustee to act and perform the trusts as fully as if he had been originally a trustee. *Held*, That the nomination of S. by the creditors as a trustee in the place of M., one of the five trustees named in the deed, vested no estate in the land in S., but that the legal estate vested in M. by the deed remained in him until he parted with it by a legal conveyance. *Wright v. Robertson*, 3 *Kerr* 78.

**4—Trustee and Creditor also—Execution by—Impeachment for Fraud.**

Where parties to a deed of assignment, in trust for the payment of creditors generally, were described as trustees of the second and creditors of the third part, and it appeared in evidence that when the deed was executed one of the trustees was also a creditor of the assignor. *Held*, That such trustee, in the absence of evidence to the contrary, must be considered to have executed the deed both as creditor and trustee. *Held* also, That such trust deed could not be impeached for fraud and misrepresentation by the plaintiff, who claimed through a party whose demand was released by the deed—the same not having been repudiated by the parties to it. *Hammond v. Barker*, 3 *Kerr* 634.

**5—Trust deed executed under Power of Attorney—Power of appointment to other, in case of refusal of one Trustee to act, or deceased.**

A. being in financial difficulty, executed a power of attor-

ney to G. M. to convey all his estate to J. M. and J. R. in trust, to pay his creditors, and in case either of them should die or refuse to act, to such person or persons as G. M. should appoint. J. R. refused to act, and G. M. conveyed to J. M. and A. B. J. M. died, and subsequently A. B. sold a parcel of the land to G. M., and conveyed it by a deed purporting to be made between J. M. and A. B., trustees of the one part, and G. M. of the other part. *Held*, That the conveyance under the power of attorney was good; that the estate vested in A. B., the surviving trustee, that the deed from him to G. M. was good; and that G. M.'s title was complete. *Doe dem. Moffat v. Thompson et al* 1 P. & B., 516.

#### IV.

#### COMPOSITION DEED.

##### **1—Partners—Assent of—Proof of Execution by trustees.**

One of three partners assigned to trustees for payment of the partnership debts, property which had originally belonged to the firm, the deed reciting that the other partners had conveyed to him. *Held*, 1st. That such assignment would be valid if assented to by the other partners. 2nd. That such assent appearing, the recital of the conveyance from them did not make its production necessary for the construction of the subsequent assignment. And 3rd. That proof of the execution of the deed by the trustees was not necessary to enable them to recover the property assigned. *McMillan v. Ritchie*, 2 All. 242.

##### **2—Schedule—Omission of.**

A composition deed recited that the grantor was indebted to certain persons in the sums set opposite their names in a schedule annexed. *Held*, That the omission of a schedule did not vitiate the deed. *Thurgar v. Travis*, 2 All. 272.

## V.

## MISCELLANEOUS.

**1—Exchange of lands—Agreement in writing—Possession—Operation—Feoffment—Tenancy at will.**

An agreement in writing between A. and B. for the exchange of lands, although accompanied by possession, will not operate as a conveyance by way of feoffment to pass the life estate to A., where the terms used do not clearly denote that it was to operate as a conveyance, and a deed of bargain and sale has been since given from A. to B. of the same land in which the agreement is recited as a contract for the conveyance of the fee. *Sutherland v. Walter*, 1 *Kerr* 141.

**2**———A writing under seal, accompanied by livery of seisin, may operate as a feoffment where such intent of the parties is clearly expressed. Where such an agreement will not operate as a conveyance, possession under it is only a tenancy at will. *Ibid.*

**3—Parol license to enter.**

A parol license from the owner of land in which mines are excepted, to the grantee of the mines to enter and dig them, vests no estate in the licensee, and is no breach of the implied warranty in a deed of bargain and sale. *Gesner v. Cairns*, 2 *All.* 595.

**4—Right of way—Rights of Public.**

The owner of land laid out and opened an alley-way leading from a street through his land, and leased the lots on each side of the alley. After the alley had been used by the public and the tenants occupying the lots for more than twenty years, G., the administrator of one of the tenants, assigned to the defendant, and by the description of the land in the deed, conveyed to him the alley as a part of the property leased. *Held*, That this conveyance could not affect the right of the public to use the alley, and that the defendant was liable for obstructing it, though the plaintiff was the tenant of a house fronting on the alley,

and also claimed under G. as representing another lessee of the property. *Leary v. Armstrong*, 1 *Han.* 22.

**5 Acquiescence—Estoppel.**

The acquiescence of the judgment debtor in a Sheriff's sale, and subsequent possession of the land by the purchaser short of twenty years, though presumptive evidence that all the necessary proceedings have been taken, will not give a title to the purchaser by estoppel. *Doe v. Hazen*, 8 *All.* 87.

**6—Estate in remainder or in presenti—Acquiescence in sale.**

The plaintiff claimed fifty acres of land under a deed in fee from his father, J. B., in 1822, of a tract of 400 acres, of which the fifty acres were part, which deed was subject to a condition that J. B. should receive and enjoy all the profits and emoluments accruing from the land during his life. J. B., in order to pay a debt, about two years after the conveyance to the plaintiff, and with his consent caused the fifty acres to be sold by the Sheriff; the plaintiff bid at the sale, and afterwards agreed with the purchaser upon a division line between that and the remainder of the land. There was no proof of any judgment or execution against J. B., or of any advertisement by the Sheriff under which the land was sold. *Held*, That if the plaintiff had a present estate in the land at the time of the Sheriff's sale, his acquiescence in such sale would not divest him of his estate. *Doe v. Baxter*, 8 *All.* 232.

*Quære*, Whether the plaintiff took an estate *in presenti* under the deed, or an estate in remainder after the death of his father? If the latter, *Semble*, That his acquiescence in the sale and division of the land during his father's life would not operate as an estoppel *in pais*. *Ibid*.

**7—Executor's Deed—Affidavit—Evidence.**

*Quære*, Whether the affidavit required by the Rev. Stat. cap. 136, sec. 42, to be endorsed on an executor's deed, is evidence of any of the proceedings except the advertising and sale of the land. *Doe v. Thompson*, 4 *All.* 483.

**8—Water-course—Right to make.**

A., being the owner of lot No. 13, through which a stream ran, granted to B., his heirs and assigns, the right to the waters of the stream and the privilege of making a dam or dams, and cutting a trench therefrom across lot 13 and lot O, into lot P, on which B. had a mill. B. made a dam and trench, which did not cross lot 13, and which not answering the purpose, he made a parol agreement with C., who had become the owner of lot 13, under which he made a second dam and trench. *Held*, That he had a right to do this under the deed, and that his parol agreement with C. did not affect that right, particularly as regarded the defendant, who shewed no title to lot 13. *McKendrick v. Purdan*, 2 All. 28.

**9—Water Privilege—Easement.**

A deed granting all the right, title, interest, etc. of A., in and to the water privilege of a piece of land described, conveys only an easement, and no interest in the land itself, therefore the grantee cannot, by virtue of the deed, maintain trespass for an entry on the land. *Watson v. Sinclair*, 3 All. 343.

**10—Mortgagee in Fee—Estate Passing—Requisites.**

The estate of a mortgagee in fee of land cannot pass by deed of bargain and sale, without enrolment or registry, nor by feoffment without livery of seisin. *Doe dem. Burkham v. Watts*, 2 Kerr 441.

**11—Valuable Consideration.**

To constitute a valuable consideration to support a deed, it is not necessary that it should be a money consideration; becoming bail for the grantor is sufficient. *Crockford v. Equitable Insurance Company*, 5 All. 651.

**12—Registry of Deed before Lease—Operation.**

A. leased land to the plaintiff for twenty-one years, and afterwards conveyed to B. in fee, by metes and bounds, a piece of land, including that leased to the plaintiff,—the deed containing the following words: "a portion



of which, on the west side of the brook, is under lease to D. (the plaintiff), which lease is not yet expired." B. conveyed the whole of the land to the defendant, and both the defendant's deed, and the deed from A. to B., were registered before the plaintiff's lease. *Held*, 1st. That B. was only a purchaser of the reversionary interest in the the land leased, and the lease was not therefore void as against him under the Registry Act. 2nd. That as B. was not a subsequent purchaser of the land leased, he could not, by conveying to the defendant, give him a better title than B. himself had. 3rd. That though the lease would have been void as against a subsequent purchaser from A. for valuable consideration, under a registered deed, A. could not, by conveying to a third person, expressly subject to the lease, place such person in the same position as the law had placed A. as the general owner. *Downes v. Gordon*, 5 All. 174.

### **13—Registry Book—Best evidence of registry.**

The best evidence of the registry of a deed is the Registry Book. Where a deed, by the memorandum endorsed, appeared to have been acknowledged on the 6th June, but the certificate of registry was dated the 5th, the Registry Book was admitted in evidence to shew that the deed was registered on the 5th June, and that the memorandum of acknowledgment was then upon it. *Doe dem. Simpson v. Falls*, 5 All. 540.

### **14—Proof of deed—Foreign Country.**

A deed executed in a foreign country, may be proved in this Province by the subscribing witness. The provision of the Registry Act as to the proof of deeds executed in a foreign country is permissive. *Crockford v. Equitable Insurance Company*, 5 All. 651.

### **15—Deed Poll—Want of mutuality.**

A. by deed poll agreed to make and haul all the timber he could find on B.'s permit, for which B. was to allow him whatever the timber sold for, after deducting B.'s

supply bill and expenses, and that all the timber got should be the property of B. *Held*, That there was no mutuality, and that B. acquired no property in the timber without a delivery. *Coombs v. Hatheway*, 3 Kerr 592.

**Livery of seisin—Sufficiency of.**

*See* Livery of Seisin. *McLardy v. Flaherty*, 3 Kerr 655.

**Evidence of—Allowed on trial—Deed not acknowledged.**

*See* Evidence VIII. 12a.

**Breach—Covenant for quiet enjoyment.**

*See* Covenant 6.

**Warranty—Breach of.**

*See* Supra 3. *Gesner v. Cairns*.

**Trustee—Right to pass estate.**

A person having the legal estate in land may by conveyance at law pass such estate, though it was given him in trust. *See Doe v. Gilbert*, 1 All. 520.

**Delivery to, or assent of grantee necessary.**

*See* Evidence XI. 84a.

**Estoppel—Mortgagor—Setting up title of mortgagee.**

*See* Estoppel I. 12, 18.

**Title after acquired by deed.**

*See* Estoppel I. 18.

**Admission of receipt of purchase money.**

*See* Estoppel I. 17, III. 2.

**Exception in lease — Construction — Obstruction of lights.**

*See* Action on the Case IV. 4.

**Sheriff's deed—Recitals of judgments—Proof of not necessary.**

*See* Sheriff's Sale 1.

**Miscalling writ in sheriff's deed.**

*See Sheriff's Deed 1.*

**Defective deed—Use of to shew extent of—Claim of possession.**

*See Trespass II. 28.*

**Deed intended to operate as mortgage.**

*See Trust. Sutherland v. Meehan.*

**Acts and declarations of grantor after delivery of deed but before registry—Binding effect on grantee.**

*See Evidence I. 27. Philips v. Trueman.*

**Deed of assignment under Insolvent Act of 1869, must be in duplicate.**

*See Insolvent Act. Parlee v. Agrl. Ins. Co.*

**Subscribing witness.**

A conveyance of land does not require a subscribing witness. *Doe dem. Sherlock v. Powers*, 6 All. 232.

**Marksman.**

*See Will.*

**Administrator's deed under license to sell—Purchaser's title—Ejectment—Evidence to cut down deed—admissibility of.**

*See Licence 12. Doe dem. Bowen v. Robertson.*

**After acquired property.**

*See Bill of Sale.*

**Dower—Release of—Not affecting after acquired title of wife.**

*See Dower. Doe dem. Burns v. McGowan.*

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**DAMAGE FEASANT.****When cattle may be taken—Place.**

A field driver appointed under the Act to impound cattle going at large contrary to the Sessions regulations can only take them while at large in the parish for which he is

appointed. The place of taking is a question for the Justices' decision, and unless it is clearly against evidence the Superior Court will not interfere. *Sterling v. Jones*, 2 *All.* 522.

**Replevin for—Justice of the Peace—Jurisdiction.**

*See* Justice of the Peace II. 11, 12.

**DEATH.**

**1—Of husband—Abatement of action.**

Action brought by husband and wife to recover money had and received to the use of the wife, does not abate by the death of the husband. *Hanington v. McManamin*, 4 *All.* 599.

**2—Summary action.**

On death of one of several defendants, before interlocutory judgment, suggestion should be made on memorandum of judgment. *See Crane v. Goodine*, 4 *All.* 371.

**Absconding debtor.**

*See* Absconding Debtor 12.

**3—Of defendant pending motion for new trial.**

Where defendant died after verdict, and pending the determination of a motion for a new trial, the Court refrained from granting a new trial until the plaintiff had an opportunity of applying to have terms imposed. *Key v. Thomson*, 2 *Han.* 224.

**Death of intestate—Letters of administration—Evidence of.**

*See* Evidence IV. 1.

**Affidavit endorsed on deed of administrator, not evidence of death of intestate.**

*See* Deed I. 24.

**4—Equity—Re-swearing—Answer—Death of one of several defendants.**

Where one of the persons named as defendant in a suit

had died before the summons issued, the pleadings were amended by striking out his name, and the answer was re-sworn. *Byers v. Harrigan*, 1 *Han.* 231.

**5—After trial and before judgment.**

Where plaintiff dies after trial and before judgment, the Court will make such orders regarding entry of judgment or new trial as will prevent failure of justice. *McMillan v. S. W. Boom Co.*, 1 *P. & B.* 715.

**6—Statute of Limitations—Insane person.**

Under the 1 Rev. Stat. cap. 141, sec. 11, (Consol. Stat. cap. 84,) an action may be commenced against the personal representatives of an insane person within the like period after the death of the insane person, as is allowed for bringing the action in ordinary cases—death being a removal of the disability. *Fairweather v. McMonagle*, 6 *All.* 297.

**DEFAMATION.**

ACTIONABLE WORDS.

PRIVILEGED COMMUNICATION.

ACTIONABLE WRITING.

AVERMENTS.

PLEADINGS—PROOF.

MITIGATION OF DAMAGES.

**1—Actionable words—Rebel.**

The term Rebel is not actionable unless it is used in a treasonable sense, which must appear on the record, otherwise judgment will be arrested. See *Beardsley v. Dibble*, 1 *Kerr* 246.

**2—Slander.**

In an action of slander, the declaration alleged that the plaintiff was a clerk or servant at the store of J. Cunard & Co., at R., and that the defendant intending to injure the plaintiff, etc., and to cause him to be reputed a dishonest person and unfit to be employed as a clerk or

servant, spoke the following words to the plaintiff, "you was turned out of Cunard's store at R. for robbery—you are a d——d parcel of robbers." *Held*, That the words being actionable in themselves, proof of the particular employment of the plaintiff as alleged, was not necessary. *Hea v. McBeath*, 2 *Kerr* 301.

3———Not libellous to write of a man that his outward appearance is more like an assassin than an honest man. *See Lang v. Gilbert*, 4 *All.* 445.

#### 4—Privileged communication.

The declaration in an action of slander stated that the defendant spoke of the plaintiff as a clerk of H., the following words: "That miserable fellow C., (the plaintiff,) has just robbed H., he has taken money from him, and put his hand in the chest. I could see it all along. C. is a robber. You don't know him,—he deceived my poor boy, and has robbed H. of seventy pounds, and I can prove it;" meaning that the defendant intended to charge the plaintiff with theft. The defendant was H.'s father-in-law, and used the words to H.'s attorney. *Held*, 1st. That as the defendant had no interest in H.'s business, the communication was not privileged, though it was made confidentially to the attorney alone. 2nd. That though the words might amount to a charge of embezzlement, they were not intended to impute larceny. *Carvil v. McLeod*, 4 *All.* 332.

5———A written paper charging the plaintiff with having wrongfully taken the defendant's logs, sawing them up and selling the lumber, is libellous, without any averment or proof that larceny was thereby imputed. *Connick v. Wilson*, 2 *Kerr* 496.

The charge in question was contained in a letter written by the defendant to McK., an intimate friend of his, who was a near relative to the plaintiff, but in no way interested or concerned in business with either party, with the avowed object of the defendant availing himself of McK.'s influence and good offices in his controversies with the plaintiff, and to warn the plaintiff and his mother against the conse-

quences of law suits, and the alleged interested motives of his attorney. McK. being absent from the country, the letter was opened by his agents and relatives, and became public. *Held*, That this was not a privileged communication. *Ibid*.

#### **6—Actionable writing.**

A writing which tends to vilify and degrade a person, is actionable, although no crime be imputed. *Connick v. Wilson*, 2 Kerr 617.

#### **7—Prefatory averments.**

In a declaration for a libel prefatory averments are not necessary, where the charge is apparent on the face of the paper, without reference to extrinsic facts. The question after verdict is, whether enough appears on the record to sustain the action. *Ibid*.

#### **8—Professional misconduct—Charge.**

A written paper charging the plaintiff (an attorney) with being governed entirely by a craving after his own gains, without regard to the interest of his clients, and reckless of bringing them to ruin, is libellous; and if the jury find a verdict for the defendant, the Court will grant a new trial if they think the verdict is wrong, though the Judge left the question of libel to the jury, without expressing any opinion upon the writing. The charge in question was contained in a letter written by the defendant to McK., a friend of his, but who had no interest in the business, with the object of obtaining McK.'s influence in settling certain law suits in which the defendant was engaged. *Held*, That this was not a privileged communication. *Held also*, That the defendant, intending the letter to be confidential, would not justify him in casting injurious imputations on the plaintiff's character. *Andrews v. Wilson*, 3 Kerr 86.

#### **9—Forswearing allegiance—Charge—Proof of slanderous matter.**

Libel, charging the plaintiff, an Englishman, with having forsworn his allegiance to his country by enlisting in

the American army, and afterwards deserting therefrom. Plea of justification. *Held*, That an Englishman who enlists in the army of a foreign country, and takes an oath of allegiance thereto, forswears his allegiance to his native country; and that the plaintiff's admission that he had enlisted in the American army and deserted, might as against him be taken to be true, and therefore was evidence to prove the justification. *Hill v. Hogg*, 4 All. 108.

#### **10—Perjury—Imputation of.**

The defendant wrote a letter to A., relative to an affidavit made by the plaintiff about the service of a writ on him as A.'s agent, containing, among others, the following statements: "If L., (the plaintiff,) swears that I did not serve him with a copy of that writ on the 31st October last, he swears to a lie. \* \* \* I think from the experience you have of mankind, you will admit that the outward appearance of L is more like an assassin than an honest man; you must admit that he is exceedingly low bred and ungentlemanly, and consequently cannot appreciate the feelings, conduct or character of a gentleman." In an action for a libel contained in this letter, the declaration charged the defendant with imputing perjury to the plaintiff. The defendant justified the truth of the charge, and the jury found—contrary to the evidence of the plaintiff—that the defendant had served him with the writ on the 31st October. *Held*, 1st. That if the plaintiff had made an affidavit respecting the service of the writ, the jury having found it to be untrue, the justification was proved, and the plaintiff could not recover. 2nd. If the plaintiff did not make the affidavit, the letter was not libellous, because it only stated the matter hypothetically. *Lang v. Gilbert* 4 All. 445.

#### **11—Action for defamation—Allegation of perjury—No jurisdiction to administer oath—Plaintiff cannot recover.**

*See McAdam v. Weaver*, 2 Kerr 176.

#### **Averment of perjury—Facts necessary.**

*See Perjury.*



**12—Pleadings—Notice of defence.**

A notice of defence, in an action for a libel, stating that the allegations contained in the writing are true, is sufficient under the Act 13 Vic. cap. 32, there being no affidavit of the plaintiff that he was misled by the generality of the notice. *Lang v. Gilbert*, 4 All. 359.

**13—Averment.**

In calling a woman a whore, it is sufficient to aver in declaration that the defendant intended to impute unchastity. *Martindale and wife v. Murphy and wife*, Ber. 85.

**14—Proof of innuendoes.**

In an action for slander for charging the plaintiff with perjury, some of the counts stated in the inducement that the words were spoken of and concerning the plaintiff, and of and concerning a certain affidavit, etc., the defendant justified, setting out the affidavit, and alleging certain statements therein contained to be wilfully false. The affidavit referred to two papers which were annexed, but there was no positive proof that they were annexed when the affidavit was sworn to by the plaintiff. *Held*, that there was sufficient *prima facie* to let in the whole of the affidavit, and that the admission of part to be read without the papers annexed was not correct, and the innuendoes not sufficiently proved. *Milner v. Gilbert*, 3 Kerr, 617.

The verdict being for plaintiff—*Quære*, Whether this was a sufficient ground for a new trial; the statement alleged by the defendant to be false, and on which he founded his charge of perjury, being contained in that part of the affidavit which was read, and the defendant being obliged to make use of it to support his plea. *Ibid*.

In other counts the words were, "He perjured himself in an affidavit in C.'s suit," without any inducement stating the words to have been spoken of and concerning the affidavit. *Held*, That it was not necessary for the plaintiff to prove any affidavit, but that the *onus* was on the

defendant in support of his pleas of justification to prove that the plaintiff had sworn wilfully false in an affidavit in C.'s suit. *Ibid.*

#### 15—Proof of words.

It is not necessary in slander to prove all the words as laid in the declaration, if the words proved do not qualify those alleged. The words alleged were, "you perjured yourself in the suit between Thomas and me before Lawlor." The words proved were, "you perjured yourself in the suit between *your brother* Thomas and me," etc. *Held*, No variance. *Vye v. Newman*, *Hil. T.* 1866.

#### 16—Mitigation of damage—Evidence.

In an action of slander for charging the plaintiff with stealing, evidence of the general bad character of the plaintiff is not admissible in evidence in mitigation of damages. *Williston v. Smith*, 8 *Kerr* 443.

#### 17—Limitations—Other action for same offence—Evidence.

To a plea of the statute of limitations in an action on the case for slander, the plaintiff replied, under one of the exceptions in the Statute, that another action was brought in this Court within due time for the said identical grievances, in which a verdict was given for the plaintiff, but the judgment afterwards arrested *prout putet per recordum*, and that the present action was commenced within one year; the defendant rejoined *nul tiel record*. *Held*, That the replication was sufficiently proved by the production of a record in which the declaration contained substantially the same actionable words, although the venue was different, and material omissions in the innuendoes were supplied in the new action. *Beardsley v. Diblee*, 2 *Kerr*, 254.

Where the same evidence would be applicable to both actions, the identity of the grievances is a question of fact for the jury, although the additional allegations may make further proof necessary in the new action. *Ibid.*

**18—Privileged communication—When made in discharge of duty—Official person—Proof.**

A plea in an action for slander must show that the words complained of were spoken by defendant in the discharge of his duty. Therefore where the plea alleged that the defendant was appointed by the Governor-General Chief Inspector of the Post Office Department in Canada, with authority over all Post Office Inspectors and their respective districts; and in cases where there were reports of money letters being missing, or money abstracted from letters, it was and is the duty of defendant to investigate and inquire into the same, and if he deemed it advisable and necessary, to proceed in person to the district in which it was reported such money letters were missing or moneys abstracted; and he was also authorized to suspend or dismiss any person employed in the Department, if, in the course of such investigation, he deemed it to the interest of the Department to do so. That plaintiff and one W. were clerks in the Post Office at S., within a district over which defendant, as Chief Inspector, had authority, W. being above plaintiff, and defendant being their superior officer, and it having been reported to defendant that money had been abstracted from registered letters, and that letters containing money were missing from the S. Post Office, it became defendant's duty to investigate the same, which he did, and in course of the inquiry he deemed it advisable to suspend plaintiff, and that he communicated the same to him and the said W., and thereupon, in his capacity as such Chief Inspector, and in the course of his duty in such investigation, and in making said communication, and because it was necessary and incumbent on him as such Chief Inspector to do so, and as an act of duty and not otherwise defendant spoke and published the said words. *Held*, A bad plea, inasmuch as by "The Post Office Act, 1867," the duty of inquiring into complaints of losses of valuable letters is confided to Post Office Inspectors to be stationed at certain places in Canada. That the Act recognizes no such officer as Chief Inspector, and that defendant was, therefore, not the officer whose duty it was to make such enquiry. *Waterbury v. Dewe*, 2 P. & B. 6.

**19 — Slander — Privileged Communication — Insufficiency of Plea shewing authority in defendant to make enquiry and to make communications — Civil Service employee—Superior officer.**

A plea to a declaration for slander, charging defendant with having falsely and maliciously published of plaintiff (who was a clerk in the Post Office in S.) that he had feloniously abstracted and stolen letters out of said Post Office, alleged that defendant was a Post Office Inspector employed in the Civil Service of Canada, in the Department of the Postmaster-General; that plaintiff and one W. were respectively clerks employed in the Post Office in S., the defendant being their superior officer, and W. being superior to plaintiff, and it having been reported that moneys had been abstracted from registered money letters, and also that unregistered letters containing money were missing from the Post Office in S., the defendant, as such inspector, was directed to proceed to S. to examine and inquire into the facts of the abstraction of such moneys and missing letters, and to hold an inquiry in respect thereto, and to ascertain the person or persons who had abstracted or taken such letters; and defendant was authorized to suspend or discharge any clerks employed in said Post Office if he should deem the same advisable; that he did examine into and hold an inquiry as to the facts, the result of which was that he deemed it expedient to suspend plaintiff from his employment as clerk in said Post Office; and that he, as part of his duty, communicated the fact of his suspension to plaintiff and W.; and in making such communication, it was necessary to speak, and as an act of duty and not otherwise, he, on that occasion, did speak and publish the words, statements and conversations in the declaration mentioned. On demurrer: *Held*, That if the plea had disclosed the defendant's authority to make the alleged inquiry, the case would come within the principle of the decision in *Dawkins v. Lord Rokeby*; and the words spoken would be absolutely privileged; but that the mere appointment of defendant as Inspector would not, under 31 Vic. cap. 10, of itself, give him such authority, and

that the plea was, therefore, bad : per Allen, C. J., and Fisher, Wetmore and Duff, J. J.; but per Weldon, J., that the authority of the defendant to make the inquiry was sufficiently alleged. *Waterbury v. Dewe*, 3 *Pug.* 670.

**Slander of title—Necessary to allege special damage.**

To maintain an action for slander of title, the words must be followed as a natural and legal consequence by a pecuniary damage to the plaintiff, which must be specially alleged and proved, and mere words of caution are not enough. There must also be an express allegation of some particular damage resulting to plaintiff from such slander. *Gordon v. McGibbon*, 3 *Pug.* 49.

**Charge of false Swearing—No jurisdiction to take oath.**

See Justice of Peace IV. 23. *Ganery v. Fawcett*.

**DEFEASANCE.**

See Warrant of Attorney.

General Rules 27.

**DEFENCE.**

See Evidence VIII.

**Notice of.**

See Pleading III.

**DEFENDING WARRANTED TITLE.**

**Recovery of costs.**

See Warranty.

**DE INJURIA.**

*De injuria* may be a good application in an action of *assumpsit*, and is not confined to actions of tort.

In an action by the endorsee against the maker of a promissory note, the defendant pleaded that the note was discounted by the plaintiff on a usurious contract. Replication—*de injuria*, held good. *Bank of British North America v. Fisher*, 1 *All.* 606.

**DELAY.**

See Bail 14, 15.

Certiorari II.

Specific Performance.

**Objecting to Partition.**

*See* Partition.

**Enlarging rule nisi, not allowed unless delay satisfactorily accounted for.**

*Ex parte Glass*, 2 All. 88.

**DELIVERY.****1—Sufficiency of—Direction to Jury.**

Where A., the owner of a quantity of timber, being largely indebted to the plaintiffs, who were to be paid by means of such timber, directed his agent B., to take possession of and hold it for the plaintiffs, and B. accordingly took possession, and put his mark upon the timber, and communicated this direction of A. to the plaintiffs, who assented thereto, although it did not appear that any absolute delivery of the timber, or the survey bills thereof, had been taken by the plaintiffs, nor any credit therefor given in the plaintiffs' books. *Held*, That the Judge was right in directing the jury that such acts and directions amounted to a delivery, and that such timber could not be afterwards taken in execution by the defendant against A., the original owner. *Crookshank v. White*, 1 Kerr 867.

**2—Construction of Contract—Necessity of delivery.**

A. agreed in writing to cut 100 M. feet of logs on land of which he had the permit, and deliver them to the plaintiff in the following spring, the logs to be the property of the plaintiff; and that plaintiff might at any time take possession of the logs and sell them, and after deducting from the price the amount of his supplies, and all expenses he might be put to with them, to pay the balance, if any, to A. *Held*, That without a delivery, or some act done by the plaintiff under the agreement, he had no property in the logs cut thereunder by A. *Tompkins v. Tibbits*, 1 Han. 817.

**3—Necessary Acts—Actual or Constructive.**

A., the owner of timber in possession of the Fredericton Boom Company, for the purpose of being rafted, agreed

verbally to transfer it to the plaintiff, to be sold to pay certain creditors of A., and gave the plaintiff a written order upon the agent of the Boom Company, to deliver to the plaintiff all the lumber in the boom belonging to A. of certain marks. When the order was presented, the Secretary of the Company said it would be all right; but no transfer was made in the books of the Company, nor any delivery of the timber to the plaintiff, nor any dealing with it by him. *Held*, That no property passed to the plaintiff, and that the timber was liable to an execution, subsequently issued against A. *Allen v. Ferguson and White*, 1 *Han.* 149.

#### **4—Bulky Article.**

A symbolical delivery of a bulky article, such as timber, is sufficient to pass the property to the purchaser. Therefore, where A., the manufacturer of timber, which was hauled by B. on the shares, agreed to sell the plaintiff 500 tons out of a larger quantity lying on the bank of the river, and sent his agent, with the plaintiff, to deliver this quantity to him, which the agent did by putting his hand on one stick in the name of the whole, B. being present and agreeing that his men should assist the plaintiff's men in rafting the timber, which they did, and the plaintiff and B. each had separate rafts. *Held*, That there was a sufficient delivery to the plaintiff, as against a person claiming under an execution against B.; that if B. had a lien on the timber for the hauling, he had lost it by parting with the possession. *Fiddes v. Henderson*, *C. Ms.* 47.

#### **5—Vesting of property.**

A. having a license from the Crown to cut lumber, agreed with B. that he should go upon the land and cut, and deliver the lumber to A. at a certain place, and that on delivery A. would pay him 20s. per M. for the lumber; and he also agreed to furnish B. with supplies to get this lumber. *Held*, That until delivery or some transfer by B. of the lumber cut, no property in it vested in A. *Reynolds v. Ayres*, 5 *All.* 333.

#### **Sufficiency of.**

*See Contract 27. Hanington v. Cormier.*

**Whether property passes under an agreement, a question of intention.**

*See Contract 24. Gibson v. McKean.*

**Appropriation—Delivery.**

*See Contract 25. Sprague v. King.*

**Property in lumber—Construction of Agreement—Right to resume possession on non-payment.**

*See Contract 28. N. B. Ry. Co. v. McLeod.*

**Evidence of delivery.**

*See Contract 26. West v. Rutledge.*

**Assignment—E on a fides—Execution—What constitutes delivery.**

*See Assignment 1.*

**Delivery when not necessary.**

*See Trover 5.*

**Re-delivery of ship.**

*See Shipping Law 6.*

**Sufficiency of delivery.**

*See Contract 1.*

**DELIVERY ORDER.****Usage—Acceptance.**

*See Contract 2.*

**DEMAND OF PARTICULARS.****Not a step in cause.**

*See Affidavit III. 6.*

**Not a waiver of necessity of filing plea before appearance in summary action, nor a step in cause.**

*See Andrews v. Hanson, 1 All. 509.*

Defendant demanding particulars of plaintiff's claim stays cause, and defendant cannot therefore move for judgment as in case of nonsuit. *O'Brien v. Tate, 2 Pug. 4.*



**DEMAND OF PAYMENT.**

*See* Bills and Notes I. 1, 17. III. 15.

**DEMAND OF PLEA.**

*See* Practice VII. 15.

**DEMAND OF POSSESSION.****Effect of.**

*See* Partition.

**Termination of Tenancy.**

*See* Tenant at Will 3.

**DEMAND AND REFUSAL.**

*See* Trover. Contract 11.

**DEMURRER.**

*See* Pleading—Practice—Amendment.

**DEMURRER BOOKS.**

**Demurrer books not delivered according to rule of Court—Application to re-enter cause after Judgment.**

*See* Practice V. 38. *Anderson v. Fawcett.*

**DEPARTURE IN PLEADING.**

*See* Pleading.

**DEPOSITIONS.**

*See* Evidence IX.

**DE PROPRIETATE PROBANDA.**

*See* Replevin.

**DEPUTY.**

*See* Sheriff.

A Sheriff may appoint a special deputy to execute a writ without requiring security from him. The 1 Rev. Stat. cap. 131, only applies to the general deputies of the sheriff appointed under the Act. *Patterson v. Tingley*, 5 All. 553.

**DEPUTY TREASURER.**

**Appointment—Are revenue officers—Bond—Continuance in office—Liability.**

Deputy Treasurers, appointed under the revenue laws in this Province are substantive revenue officers of the Crown, although appointed by the Province Treasurer, and the appointment does not terminate with the life of the Province Treasurer from whom it has proceeded, and consequently the surety bond given to the Crown by the deputy Treasurer on this appointment continues in force, and the sureties are liable for misconduct or defalcation committed by the deputy during the time of a subsequent Province Treasurer, such deputy continuing to act without any new appointment. *The Queen v. Kerr*, 2 Kerr 137.

The surety bond extends to moneys received by the deputy under ordinary revenue acts passed subsequently thereto, and also to moneys collected for special purposes by the deputy under acts in force at the time of the appointment, such as the sick and disabled seamen's fund, the emigrant fund, beacon and buoy money; and also to the Governor's share of seizures made by such deputy, but not to the surplus revenue received at the Customs under acts of the Imperial Parliament, which is only properly payable to the Province Treasurer. *Ibid.*

The deputy who may have received such surplus revenue in his official capacity from the collector of the Customs is liable therefor to the Crown, although his sureties may be exempt; and the Crown may apply the moneys levied under extent against the deputy, to any part of the demand for which the extent has issued, to which he is liable. *Ibid.*

**DERELICT LAND.**

Where a navigable river recedes gradually and imperceptibly, the derelict land belongs to the riparian proprietors. See *Burke v. Niles* 2 Han. 166.

**DESCRIPTION.**

See Abuttal.

Crown Grant.

Deed.

**Of parties as Executors.**

*See* Executors and Administrators V. 6.

In an action for injury to personal property contained in a building, it was held not necessary to specify the property injured, and that the words "the property therein," were sufficient. *Brewing v. Berryman*, 2 *Pug.* 515.

**DESCENT CAST.**

The doctrine of descent cast enures to the benefit of the heirs only, and not to strangers. *Doe dem. Thompson and wife v. Purvis*, *Ber.* 426.

**DEVASTAVIT.**

Allegation of devastavit without specific averment of value of goods wasted, is bad. *See Therlock v. McGee*, 1 *All.* 116.

**Averment of injury to estate.**

*See* Bond (Administration Bond).  
Executors, &c.

**DEVIATION.****Voyage.**

*See* Insurance 29, 84, 85.

**Contract.**

*See* Assumpsit.

**DEVISE—DEVISEE.**

*See* Will.

**DIES NON.**

Good Friday, though a public holiday, is not a *dies non*, and a taxation of costs on that day is not irregular. *Gilmore v. Gilbert*, 2 *All.* 50.

**DIRECTOR.**

*See* Corporation—Bank.

**DISABILITY.**

*See* Limitation of Actions.

**DISCLAIMER.****Tenancy under wife—Refusal to pay rent to Husband.**

Defendant held as tenant from year to year under an agreement with plaintiff's wife, and with his consent, the

rent to be paid to the wife. *Held*, That refusal to pay rent to the plaintiff, and a denial of *his* right to the property, but at the same time, claiming to hold it under the lease from the wife, did not amount to a disclaimer. *Doe dem. Andrews v. Taylor*, 5 *All.* 144.

**Claim of right to property.**

B. let land to the defendant as tenant from year to year, and died leaving an infant heir. The guardian of the child demanded the rent and gave notice to quit. The defendant refused to pay, saying she would have kept the land and taken care of the child, if she had been allowed, and that she had as good a right to the property as any body else. After the time mentioned in the notice for giving up possession, the guardian again demanded it. The defendant refused to give up the property, and said she had a better right to it than any one else. *Held*, That although it might be doubtful whether the defendant's first refusal amounted to a disclaimer of the right of the heir; the second refusal, being unequivocal, was a disclaimer, and entitled the heir to recover in ejectment. *Reed v. Brown*, 2 *All.* 366.

**DISCHARGE.**

*See Arrest.*

Bankrupt.

Insolvent Debtor.

Bail.

**1—Action by Executor—Release by Devisee.**

The Court will not order the discharge of a debtor in custody at the suit of an executor, on the ground that the persons beneficially interested under the will have agreed to release the debt, and have directed the executor to grant a discharge. *Percival v. McKenzie*, 1 *Kerr* 498.

**2—Plaintiff discharging Debtor—Remedy on judgment.**

The plaintiff by proceeding against the Sheriff by attachment for not returning the execution, and afterwards consenting to discharge him on making the return and

paying costs, does not lose his remedy against the defendant on the judgment, unless from the circumstances attending the proceedings against the Sheriff, his consent to discharge the defendant can be implied. *Carman v. Mott*, 3 *Kerr* 181.

**Refusing to discharge on Equitable Satisfaction.**

*See* Action at Law IX. 1.

**3—By one of several Plaintiffs—Second Arrest.**

Where a defendant was discharged by one of several plaintiffs, he cannot be arrested a second time at the instance of a co-plaintiff, and a rule *nisi* obtained by consent of defendant's counsel in order to file affidavit to get license of a Court to issue a second *ca. sa.* was discharged with costs. *Executors of Andrews v. Clarke*, *Ber.* 32.

**Improper Discharge of Debtor by Judge's order—Issuing *fi. fa.* before order rescinded.**

*See* Execution IV. 19.

**Insufficient Affidavit for order to hold to Bail—Application to rescind order.**

*See* Arrest 10.

**DISCONTINUANCE.**

**Plaintiff has power to discontinue his suit before decree.**

*See* *Gilbert v. Campbell*, 1 *Han.* 471.

**Service of rule to discontinue without payment of the costs. Party entitled to move for judgment as in case of nonsuit.**

*See* *White v. Burton*, 1 *Han.* 1.

**Parol gift of land—Statute of Limitations.**

*Quere*, Whether a party gives land to another by parol, and puts him in possession, this might not be considered a discontinuance of the donee's possession, and the Statute of Limitations begin to run at once, and not at the end of the year? *Doe dem. Vincent v. Murray*, 2 *Pug.* 375.

**Several defendants—Setting aside rule.**

Where there were several defendants, and plaintiff obtained a verdict against one, but verdict was found in favour of the others, and a new trial was obtained, the rule being silent as to costs, a side bar rule obtained by plaintiff to discontinue the action was set aside by the Court, which, however, gave plaintiff leave to apply to discontinue on terms.

In this case the rule for a new trial was taken out in general terms, though obtained by the attorney of the defendant, against whom the verdict was, and it having been done through inadvertence of counsel, the Court set aside the side bar rule to discontinue, but without costs. *Harris v. Marter*, 2 *Pug.* 495.

**DISCOVERY OF NEW EVIDENCE.**

*See* New Trial I. 8, II. 18, III. 9.

**DISHONOUR (NOTICE OF.)**

*See* Bills and Notes IV.

**DISMISSAL OF CAUSE.****Non-entry of Cause.**

*See* Practice V. 3.

**DISMISSAL OF COMMISSIONERS.**

*See* Appointment of Officers of Servant.

Master and Servant 6.

**DISQUALIFICATION.**

*See* Judge.

Commissioners.

University of New Brunswick.

Election.

**DISSEISIN.**

*See* Limitation of Actions IV. 22.

Deed.

**Question of disseisin left to jury—Verdict for plaintiff undisturbed.**

*See Possession 1.*

**1—Grantor conveying whilst disseised—No estate passes.**

If, at the time of the execution of a deed of conveyance of land, the grantor is disseised, no estate passes to the grantee. *Doe dem. Thompson v. Barnes, Ber. 426.*

**2—Facts constituting disseisin must be clearly apparent.**

All the facts which constitute a disseisin should be clearly made out, and no presumptions allowed in disseisin. Where it is doubtful whether certain acts amount to a disseisin, or are mere acts of trespass; or, whether the occupation was adverse or permissive, the question should be left to the jury. *Ibid.*

**3—Original entry not wrongful—Wrongful Continuance.**

Where the original entry of a person upon land is not wrongful, there can be no disseisin except at the election of the owner: a wrongful continuance in possession will not work a disseisin. Where A. went into possession of land with the consent of the grantee, and held for a number of years, paying rent, and acknowledging the title of the grantee, and died in possession; after which, his widow let the defendant in possession, who refused to give up the land. *Held*, That the defendant's wrongful continuance in possession was not a disseisin, and did not prevent the operation of a deed from the heirs of the grantee. *Doe dem. Strange v. Thompson, 1 Kerr 564.*

**4—Disseisin—Question for Jury.**

Disseisin is a question of fact for the jury to decide; and if on a trial in ejectment a verdict is taken for the plaintiff by consent, subject to a motion for a nonsuit, on the ground that the party through whom the plaintiff derives title was disseised at the time he conveyed to plain-

tiff; the Court will not decide the question, but send the case down to a jury. *Doe dem. Dowling v. Pearson*, 3 Kerr 135.

**5—Possession—Conveying land—Subsequent Conveyance, and prior registry.**

A. conveyed land to the plaintiff, who entered into possession. A. afterwards conveyed the same land to B., who registered his deed before the plaintiff's deed, and subsequently conveyed to C., who conveyed to the defendant. *Held*, That the possession of the land by the plaintiff, not being wrongful, would not prevent the operation of any of the deeds under which the defendant claimed title. *Payson v. Good*, 3 Kerr 272.

**6—Continuance in possession as against registered deed.**

Where a party enters under an unregistered deed his continuance in possession, though wrongful as against a subsequent purchaser claiming under a registered deed, does not amount to disseisin. *Ibid*.

**DISTRESS.**

**1—Replevin—Distress for rent—Averments—Surrender by operation of law—Questions left to jury.**

In replevin for scows, the defendants averred the taking as a distress for rent of a slip, due them from W. The plaintiff pleaded—1st. That the slip was a place over which the tide ebbed and flowed, and was with the knowledge and consent of the defendants used by all persons as a public slip or landing place, in which their ships, etc., were accustomed to lie in the ordinary course of loading and unloading their cargoes, and other purposes connected with shipping and trade, paying to the occupier certain wharfage; and that the scows at the time of the distress were lying in the slip for the purposes aforesaid in the course of trade, with the consent of the defendants. 2nd. That before the rent became due, all the estate and interest of W. in this slip were duly surrendered to the defendants by operation of law. Replication—1st. That the scows were not lying in the slip



in the course of trade, with the knowledge, etc. 2nd. That the estate of W. in the premises was not surrendered to the defendants by operation of law before the rent became due. *Held*, That these were proper questions for the consideration of the jury, and they having found for the plaintiff on both issues, the Court refused to disturb the verdict, though they might not have come to the same conclusion as the jury on the first issue. *Hammond v. Johnston*, 3 Kerr 161.

**2—Avowry—Agreement as to suspension of remedy—Question for jury.**

To an avowry for rent due on the 1st February, the plaintiff pleaded that before the distress, on the 29th February, it was agreed between him and defendant, that the plaintiff should deliver to H. certain goods to be sold on account of the plaintiff, and should sign an order on H. to pay the proceeds as far as the amount of the rent to defendant, and if the goods were not sold before the 1st May then next, that H. should be under the direction of the defendant in the sale; in consideration of which the defendant agreed that he would not distrain for the rent in arrear before the 1st May. Averment of the delivery of the goods to, and the acceptance of the order by H., who held the proceeds of the sale to the amount of the rent for the use of the defendant. Replication, taking issue on the agreement not to distrain before the 1st May. *Held*, That it was a question for the jury whether the agreement of the parties was, that the right of distraining should be suspended. *Green v. Kehoe*, 3 Kerr 494.

**3—Trover—Distrainable goods—Bailliff—Question of felony.**

In trover against a landlord for goods alleged to have been taken by his bailiff under a distress for rent, some of which were not distrainable and were not included in the inventory, a verdict was found for the plaintiff, though the bailiff swore that the goods claimed were not taken. *Held*, That as the only question at the trial was whether such goods were taken, the landlord was liable for the act of his

bailliff; and that it was not the duty of the Judge to raise the question whether the goods were feloniously taken by the bailiff. *Myers v. Smith*, 4 *All.* 208.

*Quære*, Whether if the taking had been felonious, it would have been a defence to the action. *Ibid.*

If a locked trunk is distrained, the landlord is responsible for the value of its contents; and per Ritchie, J., the bailiff should open the trunk and take an inventory of the contents. *Ibid.*

#### **4—Breaking outer doors—Effect on legality of proceedings.**

Breaking open the outer door of a dwelling-house to distrain for rent, does not render the distress void, and is no answer to an avowry for rent in arrear, in an action of replevin for the goods. (Carter, C. J., *hesitante*, and Ritchie, J., *dissentiente*.) *Myers v. Smith*, 4 *All.* 207.

*Held*, per Parker, J., That the unlawful act of breaking the door, came within the term "irregularity" in cap. 126, sec. 7 of the Rev. Stat., for an action on the case would be the remedy. *Ibid.*

Per Ritchie, J., 1st. That the distress was illegal, and that replevin was the peculiar remedy therefor. 2nd. That sec. 7 of the Statute applied only to cases where the distress was legally made, but the subsequent conduct of the distrainer was irregular. *Ibid.*

#### **5—Fraudulent or clandestine removal of goods.**

Where goods are fraudulently or clandestinely removed without a distress, the landlord may follow them and distrain within thirty days thereafter, under 1 Rev. Stat. cap. 126, sec. 4, although the rent may not have been due, or in arrear at the time of removal. *Hoyt v. Stockton*, 2 *Han.* 60.

6—The mere removal of goods by the tenant from the demised premises, when rent is in arrear, is not conclusive evidence of fraudulent intent to prevent the landlord from distraining, although the effect of such removal may be to prevent the landlord from thus recovering the rent. In order to justify the landlord in pursuing them, it

must appear that they were removed with a view to elude the distress; and it is a question for the jury whether the removal is fraudulent within the Act of Assembly 50 Geo. III. cap. 21. *Martin v. Gilbert*, 1 Kerr 202.

**7—Distrainable interest in goods—Disputed right to goods—Wrong-doer.**

Defendant leased a house to P., who shortly afterwards gave a bill of sale of goods to plaintiff, and received from him a lease of the goods for two years. A few days before a quarter's rent came due, P. moved the goods off the premises: the defendant followed them and distrained for the rent: plaintiff gave notice that he was the owner of the goods, and forbade the sale; but the defendant, believing the bill of sale to be fraudulent, sold the goods under the distress. In trespass for taking the goods, the principal question was, whether the bill of sale was *bona fide*, but the Judge directed the jury that the tenant had no distrainable interest in the goods, and if the bill of sale was *bona fide*, the plaintiff must recover. A verdict having been found for the plaintiff—*Held*, per Weldon, Fisher and Wetmore, J. J., (Ritchie, C. J., *dubitante*,) That the tenant had no distrainable interest in the goods. Per Ritchie, C. J., That even if he had a distrainable interest, the defendant was liable for having sold the goods as the absolute property of the tenant. Per Allen J., That the tenant had a distrainable interest in the goods, and that as there was misdirection on this point, there ought to be a new trial, as it would materially affect the damages, whether the defendant was altogether a wrong-doer or not. *Pidgeon v. Milligan*, *Trin. T.* 1871.

**8—Trespass—Pleading distress for rent—Subsequent irregularity after distraint.**

It is a good plea to a declaration in trespass for taking goods, that the goods were distrained for rent and not being replevied within five days were appraised, and after such appraisement kept and detained in satisfaction of the rent; although the defendant should have proceeded to sell the goods, yet the omission to do so will not enable the

owner to maintain trespass, the original taking been lawful. The option granted by the Act 50 Geo. III. cap. 21, sec. 7, to bring trespass or case, is to be understood according to the subject matter of the grievance, and not the mere election of the party. *Rogers v. Buntin*, 2 Kerr 290.

**9—No Fixed Rent—Tools of trade—Other distrainable property.**

A distress is illegal when there is no fixed rent; so also is a distress of the tools of the tenants' trade, when there are other goods on the premises which could be distrained on. *Reilly v. McMinn*, 2 Puq. 370.

**10—Claim of Property—Replevin.**

The 1 Rev. Stat. cap. 126, sec. 12, (Consol. Stat. cap. 37, sec. 203) allowing claim of property to be put in an action of replevin, is not applicable to cases of distress for rent. *Orkwood v. Morrissey*, 3 Pug. 140. *Rourke v. Parks*, 1 P. & B. 513. (Same principle—See *Renaud v. Keswick*, 1 P. & B. 3.)

**Rent not due—Proceeds from execution—Landlord no right to retain.**

*See Landlord and Tenant.*

*Fish ex parte.*

**Cumulative remedy.**

*See Wharfage.*

**Where tenant has assigned under Insolvent Act—  
Preferential Lien.**

*See Insolvent Act. McLeod v. McGuirk.*

**Execution—Claim for rent—Reasonable time for  
Sheriff to make enquiries.**

*See Landlord and Tenant* II. 15.

**Damage to Feasant—Replevin—Justice of the Peace  
may grant.**

*See Justice of the Peace* II. 11.

**Non-payment of rent—Power of re-entry sufficient dis-  
tress—Affidavit.**

*See Ejectment* IV. 2, 3.

**Impounding Cattle.**

*See* Damage Fessant.

**Work and Labour—Agreement to credit on rent—Distress—Payment—Action for money had and received.**

*See* Assumpsit III. 40.

**Excessive distress—Necessary Allegation.**

*See* Pleading I. 58.

**DISTRESS WARRANT.****Distress Warrant—Irregular proceedings.**

The Act 18 Vic. cap. 38, relating to Sewerage and Water Supply in St. John, authorized two of the Commissioners to issue a distress warrant for a rate, but no warrant was to issue till thirty days after a demand in writing under the hands of the Commissioners or any two of them of the amount due: one of the Commissioners signed a warrant in blank without any proof of a demand made for the rate, and the other Commissioner afterwards filled it up and issued it. *Held*, That it was illegal. *Nowlin v. Sears*, 6 *Al.* 215.

The 25th section of the Act declared that no proceedings should be taken for the recovery of any rate after the expiration of one year from the time of the assessment. *Held*, That a distress levied on the 17th July 1862, based on an assessment made on the 11th July 1861, was bad, though the warrant was issued within the year—the distress being a “proceeding.” *Ibid*.

**DISTRIBUTION.**

*See* Heir at Law.

Surrogate Court.

**DISTRINGAS.**

A distringas is not the proper remedy against a Sheriff in office, to compel him to sell goods levied on. *Phillips v. Dickenson*, *Trin. T.* 1831.

Prior to Rule of Court of Hil. T. 4th Vic., the mode of proceeding against a Sheriff when out of office, for not bringing in the body of a defendant, was by distringas, and not by attachment. *Henry v. Murphy*, 1 *Kerr* 207.

**DIVERSION OF STREAM.**

See Damages I. 90.

**DIVORCE.****1—On ground of Cruelty—Necessary acts of violence.**

To entitle a wife to a divorce *a mensa et thoro* on the ground of cruelty, there must be acts of violence or ill treatment by the husband, by which her life or health is endangered; or, there must be evidence of threats of such violence or ill treatment, under circumstances which lead to a conclusion that there was an intention on his part of carrying the threats into execution. A slight blow, given without premeditation, and in consequence of very insulting remarks made to him by his wife, does not amount to cruelty. *Hunter v. Hunter*, 5 All. 598.

**2—Dower barred by Adultery—Alteration of decree so as to bar Dower—No notice—Wife not having appeared in suit.**

In a decree of divorce *a vinculo matrimonii*, on the ground of the wife's adultery, where the conduct of the husband has been free from blame, the wife should be barred of her dower. *Leeman v. Leeman*, East. T. 1872.

Where, in such a case, the decree of the Court of Divorce did not bar the dower, the Supreme Court, on appeal by the husband, under the Act 23 Vic. cap. 97, ordered the decree to be altered in that respect, though no notice of the appeal had been given to the wife—she not having appeared to the suit. *Ibid.*

**Divorce obtained on false affidavits.**

See Judgment III. *Regina v. Wright*.

**DOCKETING OF JUDGMENT.**

It is not necessary for a person claiming property by virtue of a Sheriff's sale under execution, to prove the docketing of the judgment by the Clerk under 8 Geo. IV, cap. 7. *Doe dem. Barlow v. Hatfield*, 1 Kerr 417.

**DONATIO MORTIS CAUSA.**

A man in expectation of death, endorsed a negotiable note specially to his wife, and delivered it to her. *Held*,

That this did not operate as a *donatio mortis causa*, the note not being transferable by delivery only. *Weldon v. Weldon*, 2 All. 598.

A., shortly before his death, gave his wife a box containing certain things under circumstances which would amount to a *donatio mortis causa* of the box and contents. In the box was a deposit receipt for £300, which A. had in the bank. *Held*, That this record being only evidence of a debt, and not a document that could have been transferred so as to make the bank liable to a third party, this money did not pass to the wife as a *donatio mortis causa*. (See *Aniss v. Witt*, 33 Beav. 619, that money due on a banker's deposit note passes as a *donatio mortis causa* by the delivery of the note.) *Ex parte Gerow*, 5 All. 512.

### DOWER.

#### 1—View—Assignment—Particulars.

In an action of ejectment for dower, under the Act 21 Vic. cap. 35, there must be a view of the premises, and if the plaintiff recovers, the dower must be assigned by the jury in giving their verdict. The declaration may be substantially the same in form as in an ordinary ejectment, and the defendant, if necessary, may obtain particulars of the plaintiff's claim. *Doe dem Johnston v. Jardine*, 1 Pug 170.

#### 2—Equity of redemption in Land.

A widow cannot maintain an action at law for dower in land in which her husband had only an equity of redemption during the coverture; even though the husband's right has been sold since his death, and purchased by the defendant expressly subject to the right of dower, or though the mortgage may have been paid, if it is not discharged on the records. *Doe dem. McDonald v. Estabrooks*, 4 All. 455.

#### 3—Husband tenant in common.

If the husband was seised as tenant in common, the widow can only be endowed in common under the Act 21 Vic. cap. 25, and not by metes and bounds. *Doe dem. Johnston v. Jardine East. T.* 1873.

**4—View—Proceedings.**

Where an order for view is made in an action for dower under the Act 21 Vic. cap. 25, the proceedings should be the same substantially as under the writ of view under the Act 4 Anne cap. 16. *Ibid.*

**5—Arrears of Dower.**

*Semble*, That arrears of dower cannot be recovered unless the husband died seised of the land. *Ibid.*

Objection to trial of Action for Dower by common jury. See Judgment as in case of Nonsuit III. 12.

**6—Action for dower—husband seised as tenant in common.**

Where an order for view is made in an action for dower under the Act 21 Vic. cap. 25, the proceedings should be the same substantially as under the writ of view under the Act 4 Anne, cap. 16.

If the husband was seised as tenant in common, the widow can only be endowed in common under the Act 21 Vic. cap. 25, and not by metes and bounds.

*Semble*, That arrears of dower cannot be recovered unless the husband died seised of the land. *Doe dem. Johnston v. Jardine*, 1 *Pug* 338.

**7—Subsequently acquired Title.**

M., (one of the defendants), owning an undivided third portion of a lot of land, and being in possession, executed a mortgage of the whole lot in favor of the lessor of the plaintiff, at the same time giving a bond. M.'s wife, though not named as a party to the mortgage, executed it, the testimonium clause stating that she did so for the purpose of releasing her right of dower in the land mortgaged. Subsequent to the mortgage the wife acquired a title to the other two-thirds. *Held*, That the lessor of the plaintiff was not entitled to recover the portion subsequently acquired by the wife. *Doe dem Burns v. McGraw*, 2 *Pug* 185.

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**EASEMENT.**

*See* Deed. Crown Grant III. 1.

**1—Privileges and Appurtenances—Words in a deed not creating a right of way.**

*See* *Rogers v. Peck*, Ber. 918.

**2—Words in Deed—Water privilege—Interest.**

A deed granting all the right title, interest, etc., of A., in and to "the water privilege of a piece of land described," conveys only an easement, and no interest in the land itself; therefore, the grantee cannot, by virtue of the deed, maintain trespass for an entry on the land. *Wilson v. Sinclair*, 8 All. 848.

**3—Exclusive enjoyment—Acquisition of right—Cessation of use—Effect—Question for Jury.**

An easement to appropriate the water of a stream in a particular way (as by a dam to turn the water in a particular direction), may be acquired by an exclusive enjoyment for twenty years; and where such a right is once created, it is perpetual, and passes with the inheritance. *McLean v. Davis*, 6 All. 266.

4———A short cessation of the use of the easement, occasioned by the burning of a mill with which it was connected, will not affect the right, if there was an intention to rebuild the mill carried into effect within a reasonable time. *Ibid.*

5———The removal, by a tenant, of a mill-dam by which an easement has been acquired, without the assent of the owner of the inheritance, will not destroy the right; and after the expiration of the tenancy, the owner of the freehold may restore the dam. *Ibid.*

6———In a case relating to the right to an easement of this description, it is a question for the jury to determine—1st. Whether a right has been acquired by a diversion of the water for twenty years; and 2nd. If so acquired, whether it has been relinquished or abandoned. *Ibid.*

**7—Mill-pond—Soil.**

A deed of a piece of land, "together with the mill-privilege, saw-mill, and erections belonging to the same; and

also the pond or flowage above the said mill, " conveys no right to the soil of the mill-pond, but only an easement to dam the water and overflow the land for the purposes of the mill below. *Herbeson v. Cunningham*, 1 *Pug.* 235.

**8—Demise—Construction of—Wharf.**

Plaintiff leased to defendant part of a wharf forty feet wide by one hundred feet in length, " together with a right of way or passage for foot passengers, horses, carts, etc., in, through, over and upon the wharf to the southward, westward and northward " of the part leased (the eastern part fronting on a highway). *Habendum*, the demised premises " together with the privilege and enjoyment of the said wharf and the said right of way or passage hereby demised," etc. The plaintiff covenanted to keep the wharf in good repair and fit for the transportation of goods and merchandise, and for the passage of horses etc., so that it may be used by the lessee, his executors, etc., "for all purposes of ingress, egress, etc., and as a highway," etc. *Held* That the demise only extended to the portion of the wharf forty feet by one hundred feet, and that the lessee had only a right of way over the remainder of the wharf, and was liable to pay wharfage for landing goods upon it. *Lawton v. Reed*, 1 *Pug.* 329.

**Conveyance of Mill with privileges and appurtenances—Soil of piling place not passing.**

*See* Deed I. 21.

**9—Driving power of Engine—Agreement for use of.**

An agreement for the use of driving power of an engine is only an easement which cannot be created by parol, and a parol agreement would be determined by a conveyance to a third party from the party agreeing to give the power. *Brewing v. Berryman*, 2 *Pug.* 115.

**ECCLESIASTICAL CORPORATION.**

*See* Church of England.

**EJECTMENT.**

- I. LESSOR'S TITLE.
- II. BETWEEN PARTICULAR PERSONS.  
RIGHT OF ACTION AND DEFENCE.
- III. PRACTICAL PROCEDURE.

## IV. SETTING ASIDE, OR STAYING PROCEEDINGS.

## V. MISCELLANEOUS.

## VI. ACTION FOR MESNE PROFITS.

## VII. CONSENT RULE.

## I.

## LESSOR'S TITLE.

**1—Bargain and Sale—Judgment Lien—Relation of execution to prior judgment.**

Ejectment was sustained by a lessor of the plaintiff under a deed of bargain and sale from A. against the defendant, who claimed under a purchase from the Sheriff by virtue of an execution issued upon a judgment which had been obtained upon a former judgment of the Court against A., which latter judgment was prior to the deed of bargain and sale to the lessor of the plaintiff, the Court holding that the execution could not have relation back to the first judgment. *Doe dem. Peabody v. M. Knight, Ber, 376.*

**2—Lessee, Estate for years—Necessity of actual entry.**

The estate of a lessee for years is not complete without actual entry; therefore, where a lessor in ejectment made title under a lease from D., without showing any entry under the lease, and it appeared also that the defendant had been several years in possession. *Held, That the lessor's title was incomplete. Doe v. Munro, 1 All. 92.*

**3—Remainderman.**

The tenant of a devisee for life may, after the death of such devisee be ousted by the remainderman without any notice to quit. *Doe dem. Fields v. McKay, 2 Kerr 435.*

Lot No. 8, containing two hundred acres, was granted by the Crown to one W. in 1787, but it did not appear that he ever used or improved it. The lot remained in a wilderness state until 1811, when E. H. entered upon it, cleared and cultivated seven or eight acres, and resided there until her death in 1813. By her will in August 1813, she devised fifty acres of the lot to one S. for her life, with the remainder to G. F. and the heirs of his body. At the death of S. in 1842, the defendants were found in possession of the fifty acres; and it appeared that they came on the lot

under S., and paid rent to her, though the particulars of the demise did not appear. They now set up an adverse possession against G. F.—*Held*, That they occupying as tenants of S., could not set up title by adverse possession against G. F., the remainderman. *Ibid*.

*Held* also, That under the circumstances, it was fairly to be presumed they held the whole fifty acres under S., and not merely the part actually improved by E. H., and that at the death of S., the devisee for life, G. F. or his assignees were entitled to recover possession of the fifty acres. *Ibid*.

**Maintaining Ejectment without demand of possession.**

*See* Will 8.

**Heir—Disclaimer.**

*See* Disclaimer.

**4 — Lessor's Title—Rebuttal by adverse possession proved and uncontradicted.**

Where the evidence of the plaintiff's right to recover in ejectment, arising from documentary title, and constructive possession in the person who conveyed to the lessor of plaintiff, was rebutted by actual adverse occupation for twenty years past in the defendant, and those from whom he claimed, which was uncontradicted, the Court set aside the verdict given for the plaintiff, and ordered a new trial. *Doe d. McMackin v. Devine*, 1 Kerr 411.

**Title by Estoppel.**

*See* Acquiescence.

**5—Grantee of Crown—Unoccupied land—Possession.**

The grantee of the Crown, according to the ordinary mode of granting the wild lands in this Province, being deemed *prima facie* in possession of the land granted where there is no adverse occupant, it is sufficient for a plaintiff in ejectment, who claims under a grant to his lessor more than twenty years old, to shew that the land within that period remained in its natural state and unenclosed. *See Doe dem. Des Barres v. White*, 1 Kerr 595.

**6—Grantee—Adverse possession—Disseisin—Descent cast—Demise of wife's property before marriage.**

When, at the time of the execution of a deed of convey-

ance from A. to B. of certain lands, the grantor is disseised thereof, no estate passes to B. All the facts which constitute a disseisin must be clearly made out, and no presumptions should be allowed in favor of a disseisin. The doctrine of descent cast enures only to the benefit of the heirs, and not to strangers. A demise in name of husband and wife of the wife's property, laid previous to the marriage, is not good. *Doe dem. Thomson and wife v. Barnes*, *Bar.* 426.

### 7—Prior possession.

Prior possession is a sufficient title in ejectment against a mere wrong-doer. *Doe dem. Dowling v. Pearson*, 3 *Kerr* 135.

8—The plaintiff in ejectment claimed under a conveyance from A. in 1847. A. had then been in possession of the land about six years, and continued to occupy till 1856, when he left the country and the defendant took possession. *Held*, *Ritchie, J., dissentiente*, That in the absence of any title in either party, the prior possession of the plaintiff (claiming through A.) was sufficient to enable him to recover against the defendant. *Doe v. Thomson*, 4 *All.* 461.

Per *Ritchie, J.*, That less than twenty years' possession in the plaintiff, was not evidence of title in ejectment, unless the defendant entered under the plaintiff, or the plaintiff was wrongfully deprived of possession by actual ouster, or by force or fraud. *Ibid.*

### 9—Vacant Crown land.

*Quære*, Whether a mere priority of possession of vacant Crown Land is sufficient title in ejectment against a wrong-doer in any case? It is not certainly against a person who has applied to the Crown for a grant of the land, and obtained an order for the survey thereof. *Doe dem. Morrison v. McAlpin*, 2 *Kerr* 467.

### 10—Title out of Lessor—Limitations—Payment of rent.

It is a sufficient defence in an action of ejectment, to prove title out of the lessor of the plaintiff. *Doe ex dem. McGowan v. McColgan* 1 *Han.* 583.

Where the lessor of the plaintiff derives his title from his ancestor, acquired by the Statute of Limitations, it is sufficient to prove, for the defence, that such ancestor paid rent for the *locus in quo*, while the Statute was running. *Ibid.*

**Re-entry—Lease—Forfeiture.**

*See* *Infra* IV. 3.

**11—Title in third person—Mortgage.**

Defendant in ejectment may shew that at the time of the demise laid, the legal title was vested in a third person, to whom the lessor of the plaintiff had mortgaged the property, though the defendant does not claim under the mortgage. (But *see* 2 Wm. IV. cap. 23, sec. 4.) *Doe dem. Munro v. Hanson, Mich. T., 1831.*

**Possession of widow—Continuance after death of husband—Holding for whom considered — Making out title by adding possession.**

*See* Possession 4.

**12—Married woman — Parol gift to—Possession by husband—Donor's right.**

Where a party gives land to another by parol, and donee enters, he is in under the donor, and the donee is in possession simply by permission of the donor—the title does not pass by such a gift. Where there was a parol gift of land to a married woman, and the property was actually occupied by the husband of the donee and worked by him—she residing with him as his wife—*Held*, That the wife could assign no title by such possession, either as against the husband or the donor. *Quære*, Where a party puts another in possession of land, and gives him a gift of same by parol, this might not be considered a discontinuance of the owner's possession, and the Statute of Limitations begin to run at once, and not at end of a year when a tenancy at will would cease. *Doe dem. Vincent v. Murray, 2 Pug. 375.*

**13—Will—Imposing condition—Heir—Demand of Possession.**

J. M., senior, devised land to J. M., and also provided

that J. M., junr. should have full possession and control of the property until J. M. should settle permanently thereon. J. M. died in about two years after the testator's decease, without having made a permanent settlement. The heir of J. M. having brought ejectment against J. M., junr., *Held*, That on J. M.'s death, the fee passed to his heirs; also that the latter could bring ejectment without previous demand of possession. *Doe dem. Murray v. Murray*, 2 *Pug.* 361.

**Married woman—Release of dower—Property subsequently acquired.**

*See Dower. Doe dem. Burns v. McGraw*, 2 *Pug.* 185.

## II.

### BETWEEN PARTICULAR PERSONS.

**1—Tenant at will—Adverse possession—Statute of Limitations.**

Where B. being put into possession of premises by A. under an agreement for purchase, continued to hold such possession for upwards of twenty-one years, and receive the rents, profits, etc., the Court considering B. strictly a *tenant at will*, held in an action of ejectment brought by the heirs of A. against B.'s grantee, that the plaintiff's right of action was barred by the 7th section of the Act of Assembly of 6 Wm. IV., cap. 43. *Doe dem. Purdy, et al v. Peters*, *Ber.* 350.

**2—Merger of tenancy at will—Possession under agreement for sale.**

An agreement was made by A. and B. by mutual bonds, for the sale and conveyance of lands by A. to B. on payment of a certain sum on or before the 1st of May, 1829, *together with lawful interest for the first three years, and eight per cent. for the last two years, as a consideration for the use of the land.* *Held*, That B., who was let into possession under this agreement, was not a tenant at will to A., but tenant for years until the 1st May, 1829. Before that day A. died, and by his will devised the land to his widow for her life, and after her death to his children (the lessors of

the plaintiff). He appointed his widow his executrix, and the defendant, who was B.'s assignee, paid the purchase money of the land to the widow, and received from her the deed of bargain and sale. *Held*, That the defendant could not, after this, set up a *tenancy at will* under the agreement, such tenancy if any having merged in the *life estate* conveyed by the widow's deed; and that after the death of the widow an ejectment might be maintained by the children without any notice to quit, or demand of possession. *Doe dem. Cliff et al v. Connaway, Ber. 882.*

3—A person taking possession of land under an agreement to purchase, which specified no time for the continuance of the possession in the event of the purchase not being completed, becomes a tenant at will; and such tenancy must be terminated by some act of the parties, before he can be ejected on non-completion of the purchase. *Doe v. Denny 8 All. 50.*

The Act 6 Wm. IV., cap. 48, sec. 7, does not apply to such a case; but only to questions arising under the Statute of Limitations. *Ibid.*

#### 4—Landlord and tenant—Expiration of lease—Notice to quit—Holding over.

Where a tenant, under a parol lease for seven years, holds over the term (no rent having been paid), no notice to quit is necessary before ejectment brought by the landlord. *Doe v. Parkinson v. Hauptman, Ber. 484.*

#### 5—Landlord—Defence by—Necessity of shewing title against.

In an ejectment, where the landlord defends the action, the plaintiff must shew a title against him, otherwise he cannot recover. As where A. defended as landlord of B., who he admitted by the consent rule to be in possession, and the plaintiff only proved conveyances from C. to B., and from the Sheriff to the lessor of the plaintiff under an execution, of B.'s right and title to the property, without shewing any actual possession in B. or C. *Held* insufficient. *Doe dem. Hatheway v. Hatch, 8 Kerr 194.*



#### **6—Mortgagors—Defence by Tenant under title of Mortgagee.**

In ejectment by mortgagors against a tenant, who had received the possession from them, under a lease made after the giving of the mortgage, but while the mortgagors were in possession; the tenant may defend under the mortgagee's title by shewing that he subsequently became tenant of the premises to the mortgagee, and had paid rent to them. *Doe dem. Diffin v. Simpson*, 3 Kerr 194.

#### **7—Heir and Tenant by courtesy.**

A married woman, whose husband had left the country, let the defendant into possession of her land, and died; her daughter, claiming as heir, brought ejectment, and there was conflicting evidence of the death of the husband, upon which the jury found in favour of the life. *Held*, That as the husband had the possessory right as tenant by the courtesy, the verdict was properly given for the defendant. *Held* also, That though the defendant, having received possession from the mother, might be estopped from disputing the right of the lessor of the plaintiff to inherit the land, he was not estopped from shewing that she had not the right to the immediate possession. *Reed d. Burchell v. Brown*, 2 All. 168.

The heir's right of entry is suspended until the death of the tenant by the courtesy. *Ibid*.

#### **Lessee and Lessor—Defence by Lessor—Surrender of lease—Facts for jury.**

*See Surrender.*

#### **8—Persons beyond seas—Right of action.**

The right given by 1 Rev. Stat. cap. 139, sec. 16, to persons beyond seas, to bring an action for the recovery of land within ten years after the disability ceases, does not suspend the right of action during the person's absence. *Doe dem. Fitzgerald v. Maxwell* 6 All. 253.

#### **9—No documentary or possessory title.**

Defendant let into possession under written agreement, necessary to produce it, or give secondary evidence after notice to produce it. *See Evidence VII. 23.*

**10—Fraudulent conveyance—Resulting trust—Equitable estate.**

R. N., the plaintiff's father, agreed to purchase land from F., and paid for it; but being somewhat in debt, he requested F. to make the conveyance to the plaintiff—then about two years old—which was accordingly done, and R. N. took possession of the land. Upwards of a year after this, a judgment was obtained against R. N. and execution issued, under which the land was seized by the Sheriff and sold to the defendant. In ejectment by the son—*Held*, (Fisher, J., dissenting), That though the purchase by R. N., in the name of his son, might create a resulting trust in favour of the former, he would only have an equitable estate, and the defendant, claiming his right under the Sheriff's deed, had no defence against the legal title of the plaintiff under the deed from F. *Nixon. v. Romerville, Mich. T. 1871.*

**Tenant of Mortgagee—Holder of Equity of redemption.**

A tenant of a mortgagee has a right to set up the title of the latter as a defence to an ejectment brought by the person holding the equity of redemption. *Doe dem. Smith v. Snarr, 1 P. & B. 56.*

**Landlord and tenant—Re-entry—Clause from 1 Rev. Stat. cap. 126, sec. 24—Amount of Distress.**

*See* Landlord and Tenant 25. *Doe dem. Chipman v. Roe.*

**Summary ejectment by Landlord.**

*See* Landlord and Tenant VIII.

## III.

## PRACTICAL PROCEDURE.

**I—Service of Declaration.**

A service of declaration in ejectment on the tenant's son on the premises, is not sufficient without proof that it came to the tenant's knowledge. *Doe dem. True v. Fen, 1 Kerr 458.*

2———Service of a declaration by reading it in a loud voice, and passing the copy and notice under the door of

the dwelling-house, the tenant being in the house at the time and refusing to open the door, or listen to the explanation of the service. *Held* sufficient. *Doe dem. Beatty v. Roe*, 2 Kerr 169.

**3—Landlord—Affidavit—Name of tenant.**

In ejectment brought by the landlord for non-payment of rent under Act 50 Geo. III., cap. 21, where half a year's rent is in arrear, and no sufficient distress found on the premises, the affidavit of service of declaration by affixing a copy to the door of the house, the possession being vacant, should state the name of the tenant from whom the rent is due. *Doe dem. White v. Roe*, 2 Kerr 860.

4—Service of a declaration in ejectment on a daughter of the tenant, on the premises, is not sufficient to obtain a rule for judgment against the casual ejector. *Doe dem. Disbrow v. Fen, Ber.* 847.

5—Service of a declaration in ejectment on the wife of the tenant, at his dwelling-house, is sufficient. *Doe dem. Peabody v. Roe Ber.* 847.

6—Where the tenant could not be found, and no person was in actual possession, and a copy of the declaration had been affixed on the most conspicuous part of the premises, a rule *nisi* for judgment was granted, to be served in the same manner as the declaration. *Doe dem. Treadwell v. Roe*, 1 All. 585.

**7—Rule Nisi—Statement—Name of tenant—Number of days for appearance.**

The rule *nisi* for judgment against the casual ejector, need not state the name of the tenant, nor the number of days allowed him to appear. *Doe dem. Taylor v. Roe*, 1 All. 1.

**Service of—Where tenant could not be found.**

*See Supra* 1.

**8—Non-entry of rule—Excuse.**

Where the rule for judgment against the casual ejector was not entered at the term in which the notice directed

the tenant to appear, in consequence of a proposition made by him to settle the claim, and which he afterwards refused to carry out, a rule for judgment was allowed to be entered at the next term. *Doe dem. N. B. and Nova Scotia Land Co. v. Roe*, 5 *All.* 285.

**9—Claim as landlord—Allowing to defend as such.**

If the relation of landlord and tenant does not clearly exist, there should be a summons or rule *nisi* before a person claiming as landlord can be allowed to defend an action of ejectment in that character. *Doe dem. Fauls v. Fen.* 1 *All.* 585 and 683.

**10—Judgment against casual ejector—Acknowledgment of service of declaration.**

An acknowledgment by the tenant before the day of appearance, that he had received the copy of a declaration in ejectment, is sufficient to entitle the plaintiff to judgment against the casual ejector. *Doe dem Kirk v. Roe*, 2 *All.* 458.

**11—Objections as to proof of possession—Must be taken at trial.**

If the defendant in ejectment wishes to limit the plaintiff's right to recover, to part of the land, in consequence of its being chiefly wilderness, and no actual possession proved, the objection must be taken at the trial. *Doe v. McGloyn*, 1 *All.* 188.

**Premises under demise—Service of declaration—Notice of Landlord—Essentials.**

See Landlord and Tenant 26. *Orpwood v. Morrissey*.

#### IV.

##### SETTING ASIDE OR STAYING PROCEEDINGS.

**1—Judgment against casual ejector—Non-Fulfillment of agreement—Right to enter judgment.**

Where by the terms of an agreement entered into by the parties pending an action of ejectment, that the tenant should give up possession of ten acres of the land in ques-

tion, situate along a certain shore, wherever the same might be selected, but that if the selection included the house where the tenant lived, he was to be allowed to hold it until the 1st May ensuing; and on failure to perform the stipulations of the agreement on the part of the tenant, the lessor was at liberty after the 1st May to sign judgment, etc.; and it appearing that the selection along shore was to be such as to suit one W. C., and that he, with the lessor and a surveyor, went about 1st April following and made the selection of the ten acres, which included the house where the tenant resided, and afterwards the tenant in possession being dissatisfied with the selection, without the assent of the lessor got another surveyor, who made a selection of the ten acres, which excluded the house; and upon the lessor and others on his behalf coming on the premises to ascertain whether there were any mistake in the first survey, the tenant refused to let them proceed, threatened to shoot them, and refused to give up the house on the 1st May; whereupon the lessor of the plaintiff entered up judgment against the casual ejector, and sued out execution. *Held*, That the lessor was right in so doing. *Doe dem. Scovill v. Roe*, 3 *Kerr* 511.

**2—Vacant premises—Re-entry—Distress.**

Affidavit should state that the party had searched for property on the demised premises on a particular day, and that none could be found—the bald statement that no sufficient distress was to be found, not sufficient. *Doe dem. Gilbert v. Roe*, 2 *Han.* 5.

**3—Re-entry for non-payment of rent—Insufficiency of distress to satisfy rent not shewn—Lease—Renewal—Necessity of realising portion of distress if any found, before bringing ejectment on clause of forfeiture.**

A lease was made by A. to B., for fourteen years from 1st May, 1849, with a covenant by A. to pay for improvements, or renew the lease at the end of the term. A. conveyed the reversion to the plaintiff in October, 1869, at which time it was alleged that \$1,200 arrears of rent were due from B., who had left the country. In ejectment, for a

forfeiture for non-payment of the rent, the plaintiff claimed the arrears, and \$72 for a half year's rent, due since he became the owner of the reversion. The affidavit of the bailiff stated that when he served the declaration there was not sufficient distress on the premises to satisfy the arrears of rent stated to be due, and that the value of the goods on the premises at that time did not exceed \$50 in his estimation. *Held*, 1st. That as this affidavit referred to the whole arrears of rent claimed by the plaintiff, it did not clearly shew that there was not sufficient distress on the premises to satisfy the half year's rent accruing due since the plaintiff became the owner. 2nd. That as it did not appear that the lease had been renewed, or that B. held over after the expiration of the lease, or that the tenant in possession held under B., there was nothing to shew that a new tenancy was created, to which the proviso for re-entry in the lease would attach. If the goods on the demised premises are not sufficient to satisfy half a year's rent, the landlord may bring ejectment on the clause of forfeiture, without realizing a part by distress. *Doe dem. Boyd v. Roe*, 2 *Han.* 49.

#### 4—Judgment by default—Merits.

When a judgment by default in ejectment had been signed, in consequence of the neglect of the attorney instructed by the tenant to enter an appearance, the Court set it aside on an affidavit of merits, the writ of possession not having been executed. *Doe dem. Thomson v. Roe*, 2 *All.* 259.

#### 5—Staying proceedings until payment of costs of previous action.

The lessor of the plaintiff claimed under a deed from A. in 1847, and the defendant under a subsequent deed from the assignee of A., who had become bankrupt, under which deed the defendant brought ejectment against A. and obtained possession. The Court refused to stay proceedings in ejectment brought by the lessor of the plaintiff till the defendant's costs in his suit against A. were paid, though the lessor of the plaintiff had employed the attorney to defend that action. *Doe v. Thomson*, 4 *All.* 596.

**6—Second trial—Refusal to enter into consent rule—Costs.**

Where a second ejectment was brought in consequence of the tenant's refusal to enter into a consent rule containing a proper description of the premises, the Court refused to stay the proceedings until the costs of the first suit were paid. *Doe dem. Morrice v. Roe* 8 *All.* 84.

**7—Ejectment for non-payment of rent—Vacant premises—Service—Rule nisi—Irregularity.**

The lessor of the plaintiff having a right of re-entry, and there being a half year's rent due, brought an action of ejectment, and the premises being vacant, service was effected by posting the declaration and notice on the door of the house. Motion having been made for judgment *nisi*, the court granted a rule *nisi* with directions for it to be served in the same manner as the declaration. The lessor of the plaintiff treated the rule, as a rule for judgment *nisi*, and not receiving an appearance in the time allowed, signed final judgment against the casual ejector and issued a writ of *habere facias*, under which he was put into possession. On motion to set aside the judgment and writ, it was held, by Allen C. J. Weldon, Wetmore and Duff J. J. (Fisher J. *diss.*) that it was the duty of the plaintiff's attorney to see what rule was granted on his own application, and that the judgment was irregular and should be set aside.

*Semble*, Under these circumstances the lessor of the plaintiff is entitled to a rule absolute for judgment *nisi* in the first instance. *Doe dem. Stephenson v. True*, 2 *P. & B.* 748.

V.

MISCELLANEOUS.

**—Demise expired—Amendment.**

Where demise stated in a declaration had expired, the Court refused, after a delay of three years, to allow the plaintiff to amend by extending the demise, though it was suggested the defendant would set up the Statute of Limitations as a defence to a new action. *Doe v. Todd*, 1 *All.* 601.

**2—Consent rule—Lands included by mistake.**

The defendant in ejectment entered into a general consent rule; at the trial the Judge directed a verdict for the defendant for all but a small part of the land described, but the jury did not agree, and after the trial the defendant obtained an order to amend the consent rule by striking out that portion of the land, on the ground that it was included by mistake. *Held*, That as the plaintiff was entitled to a verdict for that part of the land, and consequently to the general costs of the cause, the amendment could only be made on payment of such costs by the defendant. *Doe v. Day*, 8 *All.* 440.

**3—Special consent rule.**

The lessor of the plaintiff is not bound to enter into a special consent rule without the order of the Court or a Judge. A consent rule for part of the land is special. *Ibid*.

**Verdict against evidence—Statute of Limitations operating against second trial.**

*See New Trial* II. 18.

**Landlord and tenant—Writ of restitution—Title—Right to bring ejectment.**

*See Landlord and Tenant* VII. 5.

**Ejectment for Dower.**

*See Dower*.

**4—Term of demise—Amendment—When refused.**

An application to amend the term of the demise stated in a declaration in ejectment, so as to enable the lessor to issue execution, refused after the lapse of 15 years and after the death of the tenant. *Doe dem. Fauls v. Fen*, 6 *All.* 328.

**5**———Verdict for whole premises described in consent rule, when defendant might be entitled to part. No ground for new trial. *Doe dem. McKensie v. Mather*, 2 *Pug.* 255.



**6—Several demises—General verdict.**

Where there are several demises in a declaration in ejectment, and a general verdict for the plaintiff, the defendant cannot apply to confine the verdict to one count, he should move for a new trial, if there is no evidence to sustain the verdict on one of the counts. *Doe dem. Spence v. Wel-ling*, 6 All. 479.

**Re-entry after service of writ of possession—Court has no power to interfere.**

See Attachment 54. *Doe dem. Cogswell v. Smith*.

**Ouster—Evidence of.**

See Evidence IV. 89. *Allison v. Smith. Brown v. Moore*.

## VI.

**MESNE PROFITS.****I—Evidence to sustain action.**

Where a declaration in ejectment had been served on A. and B. as tenants in joint possession, and upon A. appearing to defend, the common consent rule was entered into with him alone, whereby he was declared to be in possession of the whole premises in question, and the plaintiff nevertheless in default of B.'s appearance proceeded to enter up judgment against the casual ejector, and issue a writ of possession for the whole premises, under which a *pro forma* possession was delivered by the Sheriff to the lessor of the plaintiff, *Held*, That such judgment and possession were not sufficient to enable the casual ejector to maintain an action for mesne profits against B., the suit being still pending with A.; and *Semble*, The lessor of the plaintiff ought not to have executed an *habere* under judgment against the casual ejector, while the issue joined with A., involving the title to the whole premises, remained undetermined. *Doe v. Esterbrooks*, 1 Kerr 119.

2—An action for mesne profits against husband and wife alleging a joint trespass, is not supported by proof of a

judgment in ejectment against the wife before marriage, the marriage not being averred. *Burnham v. Watts*, 1 *All.* 89.

3 ———— *Quære*, Whether an action for mesne profits can be maintained without a judgment in ejectment. *See Doe v. Dobson*, 2 *All.* 446.

**Judgment receivable in evidence.**

*See Evidence* III. 5.

**4—Costs—Damages.**

Plaintiff entitled to recover cost of judgment against casual ejector. *See Damages* I. 24.

**Actual payment of costs necessary before recovery as damages.**

*See Damages* II. 7.

## VII.

### CONSENT RULE.

**Special — Plaintiff not bound to enter into without order.**

*See Supra* V. 8.

**Amendment of.**

*See Amendment* III. 7.

**Lateness in application for extension of demise.**

*See Supra* V. 1.

**Lateness of amendment.**

*See New Trial* III. 54.

**Lands included by mistake.**

*See Supra* V. 2.

**I—Evidence.**

Rules from the office of the Clerk of the Office of the Pleas, should be signed by the officer himself, and not by his clerk; though a consent rule in the handwriting of such clerk is admissible in evidence before a sheriff's jury on a writ of inquiry. *Jarvis v. Edgett*, 1 *All.* 264.

**2—Effect of Consent Rule.**

The lessor of the plaintiff and another person, each named J. M., applied for different lots of land ; by mistake, the grant intended for the lessor of the plaintiff, got into the possession of the other J. M., who conveyed to the defendant. In ejectment, the consent rule described the land as " granted to J. M. and by him conveyed to the defendant." *Held*, That the object of the consent rule was only to settle the local situation of the premises, and that the plaintiff was not estopped by the admission from giving proof of his title. *Doe dem. Mallet v. Robicheau*, 1 All. 419.

**3—Estoppel.**

*Quere*, Whether an estoppel which binds one defendant will bind another because he has joined in the consent. *Doe v. McDonald*, 1 All. 678.

**4—Corporation.**

*Quere*, As to the effect of a consent rule in an action brought by a Corporation. *See Doe v. Guion*, 1 All. 6.

**Production [of agreement for consent rule—Sufficient to require defendant to confess lease, &c.**

*See Practice XIV. 15. Doe dem. Johnstone v. Milne.*

**ELECTION.****Of Directors.**

*See Joint Stock Company 4.*

**Tenure of Office—Liability.**

*See Bank 8.*

**Members of Assembly.**

*See Election Law.*

**1—Polling—Completion—Equal number of votes—Double return.**

" Polling," under the Act 11 Vic. cap. 65, sec. 21, is complete when the elector declares the name of the candidate for whom he votes, and the officer enters such vote in

the poll-book; after which it is too late to require the elector to take the oath of qualification. *Stiles v. Gilbert*, 4 *Al.* 421.

Per Parker, J., That where two candidates have an equal number of votes, the Sheriff should make a double return. *Ibid.*

**2—Presiding officer—Right to vote.**

The presiding officer at an election under the Act to incorporate the Town of Moncton, 18 Vic. cap. 66, has no right to vote, except to give the casting vote where the numbers are equal. By acting as returning officer a person abandons his right to vote as a rate-payer. *Ex parte Tuttle*, 4 *Al.* 615.

**3—Parish officers—Place of meeting—Session's duty.**

The Sessions of the County of St. John had, pursuant to Act of Assembly, appointed a certain school-house in the Parish of L. as the place of meeting for nomination of candidates for Parish Officers, but the Poll Clerk had given a notice for the meeting to be held at the house of one C. in the same settlement, not more than seventeen rods' distance from the school-house. The parishioners met at the place named in the notice and organized the meeting, and then adjourned to meet at the school-house, where the election afterwards took place. *Held*, That the foundation of the election being the meeting for nominations of candidates, as that was not held at the place appointed by law, their election was bad, that in point of law there was no election, and that it became the duty of the Sessions to appoint to the several offices. *Ex parte Robinson*, 3 *Pug.* 389.

**4—Rector—Election of—Voters.**

Where at an adjourned meeting held for the purpose of nominating a rector, only a portion of those who voted were admitted to be qualified, there being a doubt as to the rest. *Held*, That if two-thirds of the qualified voters present voted for the candidate presented, the election is

good, though others who voted may not be qualified. *Held*, That in taking an open vote it is not necessary that the names be recorded, no one asking for it.

*Quære*, Whether a rector can be elected by ballot? Whether certiorari will lie to remove the proceeding in election? Also, whether payment of one dollar or upwards at any time before the meeting will entitle a parishoner to vote. *Ex parte v. Beck*, 2 *Pug.* 66.

#### **5—Corporate Bodies—Right to Vote.**

At a meeting of rate-payers held, pursuant to Act 24, Vic. cap. 54, to consider the propriety of the County granting aid to the Albert Railway, the President of an incorporated Company was present, and tendered the vote of the Company, which was refused, on the ground that the Act under which the meeting was called only gave "persons" the right to vote, and not corporations. *Held*, That the Company's vote was improperly rejected, and the proceedings were quashed. It is no argument to say that had the vote been received the result would have been the same.

The Sheriff having refused to allow the President of the Company to vote on the ground that a Corporation had not the right to vote, it cannot afterwards be set up that he produced no authority. *Regina v. Reid*, 2 *Pug.* 26.

#### **6—Confirmation of election of officers—Mandamus.**

Where a list of the parish officers elected at the parish meeting has been properly certified by the Chairman and attested by the Clerk, the Sessions are bound to confirm the election, unless some irregularity is shewn in the election. *Ex parte Robinson*, 1 *Pug.* 321.

#### **7—Councillors—City of St. John—Personal nomination of two persons.**

Under 16 Vic. cap. 87, sec. 11, Local and Private Statutes, N. B., it is necessary that two qualified electors should personally appear and nominate a candidate for the office of Councillor. Otherwise the Clerk may refuse to receive the nomination. *Ex parte O'Keefe*, 1 *P. & B.* 4

**3—Incorporated company—Directors—Election of—Proxy.**

At the annual meeting of the stockholders of the Albert Mining Co., held for the purpose of electing Directors, one of the stockholders moved that certain persons (naming them) be the Directors of the Company for the ensuing year. *Held*, That in order to defeat their election, other parties must be nominated and elected by a majority of votes, and that it would not be sufficient for the majority merely to vote against the persons nominated without voting for some one else. *Held* also, That to give a person the right to vote for another, he must distinctly put forward his claim to do so, and must explicitly vote in the name and on behalf of the stockholder whose proxy he holds. *Spurn v. Albert Mining Co.*, 2 *Pug.* 260.

**Insolvent Act of 1869—Official assignee—Rights of in defect of election of creditor's assignee.**

*See* Insolvent Act of 1869. *Marsh v. Sweeny.*

**Disqualification.**

*See* City Councillors.

Fredericton, (City of.)

**Of counts in declaration.**

*See* Trespass II. 8, 12, 13, 25.

**Of credit.**

*See* Principal and Agent 1, 2.

**Of commissioner—Taking necessary oath of office.**

*See* Commissioner 5.

**ELECTION LAW.****1—Petitioner—Qualification.**

A person who has been nominated as a candidate at an election for representatives for the Local Legislature, and has made the declaration of qualification required by the Act of Assembly 18 Vic. cap. 37, and whose name has been entered by the Sheriff as a candidate in the poll book, and has contested the election and received votes as a candi-

date, is entitled to present a petition complaining of the due election and return of a member, under "The Bribery and Corruption and Election-Petition Act 1869;" and it is not competent for the respondent, on the trial of such a petition, to shew that the petitioner was not qualified as required by the Act 18 Vic. cap. 37. *Hebert v. Hanington*, 1 *Pug.* 169.

### **2—Bribery—Knowledge of Candidate—Re-election.**

The election of the defendant as a member of the Local Legislature was set aside under "The Bribery and Corruption and Election-Petition Act 1869," for bribery and treating by his agents—the Judge certifying that the bribery was not committed by or with the knowledge or consent of the defendant. At an election held to fill the vacancy, the defendant was again elected. *Held*, That he was not disqualified for re-election, the Act not having declared any such disqualification except where personal bribery had been committed; and that the practice of the Imperial Parliament in such cases did not apply. *Kay v. Hanington*, 1 *Pug.* 26.

### **3—Costs—Taxation—Scale.**

The costs on the trial of an election petition are to be taxed, as near as may be, according to the scale of costs in actions at law, and no greater sum can be taxed for counsel fees than is allowed by the Ordinance of Fees. *Hebert v. Hanington* 1 *Pug.* 169.

### **4—False Return.**

By the Act 11 Vic. cap. 65, sec. 30, all false returns which shall be wilfully made of any member to serve in the Assembly of this Province, are prohibited and declared to be illegal; and in case any person shall return any member to serve in the Assembly contrary to the right of election established by the Act, such return shall be adjudged to be false, and the party aggrieved, to wit, every person that shall be elected to serve in such Assembly, by such false return, may sue the Sheriff or Returning Officer,

and persons wilfully making and procuring such false return, and recover the damages he shall sustain by reason thereof. *Held*, That an action would not lie against a Sheriff under this Act, for a false return to a writ of election, without proof of actual malice. *Stiles v. Gilbert*, 4 *All.* 421.

Per N. Parker, M. R. *Quære*, Whether a person returned by the Sheriff as a member, but who, upon a scrutiny before the House of Assembly, fails to maintain his right to the seat, is a person "elected," and therefore entitled to maintain an action under the Act as "the party aggrieved?" *Ibid.*

Per Parker, J. That a person having the majority of votes, and who ought to have been returned by the Sheriff, did not lose his right of action for the false return by a decision of the House of Assembly against his petition; though the *quantum* of damages might be doubtful. *Ibid.*

### **5—Costs—Attachment.**

Where the Judge who tries an election petition, makes an order for costs, under the 62nd section of the Act 32 Vic. cap. 32, an attachment for non-payment of the costs should be granted by the Judge and not by the Court. *Kay v. Hanington*, 1 *Pug.* 331.

### **6—Notice—Publication.**

Publication of notice in a newspaper "for three consecutive days," under the 69th section of the Act 32 Vic. cap. 32, cannot be made in a weekly newspaper. *Hebert Hanington*, 1 *Pug.* 324.

### **Cost of publishing and posting.**

*See Costs* 34a.

### **Allegations in petition—Materiality [of witnesses to prove.**

*See Costs* 34a.



**7—Bribery and Corruption and Election Petition Act 1869.**

The common law of Parliament, or in other words the Parliamentary Law of Agency, is in force in this Province, and is to be acted on in administering "The Bribery and Corruption and Election-Petition Act 1869." (Fisher, *J diss.*) *Duffy v. Ryan*, 3 *Pug.* 110.

**8—Agent—Admissions by.**

A conversation with a witness, or the admission of an agent, had and made on the day of the election, immediately after the close of the polls, is admissible in evidence. *Ib.*

**9—Election—Determination of.**

An election is not over till the declaration of the poll is made. *Ibid.*

**10—Candidate—Petitioner against return of member.**

It is sufficient for a person petitioning under the Act 32 Vic. cap. 32, against the return of a member elect, to show that the petitioner was a candidate *de facto*. *Hebert v. Hanington*, 6 *All.* 530.

**Insufficient ground for dismissing petition—Indemnifying petitioner.**

It is no ground for dismissing an election petition under the Act that the petitioner has been indemnified by his attorney against the costs and expenses. *Ibid.*

**Betting with elector.**

A supporter of the respondent at a previous election had made a bet with an elector that the respondent would poll a certain number of votes in a district. The respondent when informed of it, stated that he would pay the bet if his supporter lost it; he did lose it, and shortly before the election petitioned against, respondent paid the bet. *Held*, Under the circumstances, that this did not amount to bribery within the Act. *Ibid.*

**Entertainment—No previous understanding.**

Entertainment of some of respondent's friends at his

own house on the evening of the polling day, without any previous understanding, is not treating within the Act. *Ibid.*

**Agency.**

A person authorized by a candidate to canvass for him during the election, is his agent. The authority to act may be express or implied. *Ibid.*

**Bribery—Proof—Contradictory evidence.**

Where proof of bribery rested on the evidence of the person to whom the bribe was alleged to have been offered, and was denied by the agent—the whole being only matter of conversation. *Held*, That bribery was not proved. *Ibid.*

**Treating.**

The amount of treating is immaterial, if it is done for the purpose of influencing voters. Though one act of treating a few voters may not be sufficient in itself to avoid an election, it will be so, if shewn to be part of a general system of treating at different polling places. *Ibid.*

**Agent—Responsibility of candidate for act of.**

If an agent gives money to a third person to be used in treating voters, and it is so used, the candidate is responsible for it. *Ibid.*

**Giving money for conveyances.**

Giving money to provide conveyances to bring voters to the polls, is bribery within the Act, being a "provision in order to procure the electors to vote." *Ibid.*

**Costs.**

As a general rule the successful party is entitled to costs; but he will not be allowed the costs of parts of the petition containing charges of which there is no proof; nor of the particulars, if they are unnecessarily long and do not give proper information. *Ibid.*

**ELISORS.**

**Resisting appointment of.**

*See costs V. 29. Stiles v. Gilbert.*

**Elisors summoning jury—Impartiality.**

*See Jury 14. Stiles v. Gilbert.*

**ENTRIES IN BOOKS.****Credit.**

See New Trial II. 45, *Raymond v. Cumming*.

Evidence V. 11, *Smith v. Andrews*.

**ENTRY BY A CLERK IN COURSE OF DUTY.**

See Evidence III. 16.

**ENTRY FEES.****Act respecting, not retrospective.**

See Statutes 7. *Doe dem. Johnston v. Milne*.

**ENTRY OF CAUSE.**

See Practice III. (Entry Docket.)

**Insufficient excuse for non-entry.**

The Court refused, after trial and verdict for the plaintiffs, to allow a cause to be entered, though the defendant's attorney consented; the only excuse alleged for not entering it at the return of the writ being that the plaintiff's attorney expected it would have been settled. *Doherty v. McGrath*, *Hil. T.* 1866.

**Judgment, as in case of non-suit, cannot be signed unless the cause has been duly entered by the plaintiff in the clerk's office.**

*Miller v. Weldon*, 1 *Han.* 376.

**Cause improperly entered—Attorney's duty cause made a remanet cannot move for judgment as in case of non-suit.**

See Judgment IV. 2, 6.

**Motion for judgment absolute as in case of non-suit should not be entered on motion paper.**

See Judgment as in case of Non-suit I. 26.

**Entry of cause after time limited.—Reasons for neglect—Costs.**

Plaintiff's attorney, through an oversight, omitted to enter the cause at the proper time, and both parties proceeded, believing it was properly entered, until defendant

obtained judgment on a demurrer, when it was discovered no entry docket had been filed, and the clerk refused to enter up the judgment. In an interlocutory proceeding on the part of the plaintiffs, it was stated the cause was entered, by which the defendant's attorney was misled and did not search at the clerk's office. The Court (Weldon and Wetmore, J. J.) on defendant's application, granted a rule for plaintiff's attorney to enter the cause. An application made in the same cause, to compel the plaintiff's attorney personally to pay the costs of defence, was refused; and this application having been embraced in the notice of motion, the rule granted to enter the cause was made without costs. *Oulton v. Milner*, 3 *Pug.* 221.

#### ENGLISH STATUTES.

*See British Statutes.*

#### ENLARGING RULE.

##### 1—Delay in Service.

Where a rule to shew cause has not been served in time, it will not be enlarged unless the delay is satisfactorily accounted for. *Ex parte Glass*, 2 *All.* 88.

2—A rule *nisi* for quashing a conviction was granted in Easter Term, returnable at the next term, the rule was not served upon the Prosecutor of Justice until the day preceding Trinity Term, the Court refused to enlarge the rule, no satisfactory reason being shown for the delay. *Regina v. Harshman*, *Trin. T.* 1868.

##### 3—Ignorance of Practice.

Where a rule for *certiorari* was made in Trinity Term, but the writ was not taken out, the Court refused in Michaelmas Term to enlarge the rule on an affidavit of the attorney that he was not aware that by the practice he ought to have taken out the writ before Michaelmas Term. *Regina v. Harshman*, *Mich. T.* 1872.

#### Enlarging rule for attachment.

*See Practice VIII.* 22.

**EQUITABLE MORTGAGE.****Debenture bond—Railway Company—Undertaking—  
Seizure of land under fl. fa.**

The defendants, being indebted to the plaintiff in the sum of £1000, executed a bond to him, declaring that for the purpose of securing the debt and interest they granted to him (*inter alia*) the undertaking of the Company, and all moneys to arise from the sale of their lands, with a condition that on failure of payment on a certain day, the plaintiff might, upon giving three months' notice, enter upon the receipt of the proceeds of the sales, tolls, etc., and upon the absolute possession of the railway, etc., and reimburse himself the amount due, provided that "nothing therein should be held to limit the powers of sale or appropriation by the Company, of any of their lands, nor constitute a charge upon the same." *Held*, That this did not constitute an equitable mortgage on the lands of the Company, and that judgment creditors of the Company, without notice of the bond, could not be restrained by injunction from selling the lands under execution. *Wickham v. The N. B. and Canada Land Company*. [S. C. Law R. 1 P. C. 64.] 6 *All.* 175.

*Quære*, If an equitable mortgage was complete, how it would be affected by a subsequent judgment and execution. *Ibid.*

*See* Trusts.

**Absolute deed intended to operate as a mortgage.**

*See* Trusts.

**EQUITY.**

*See* Trust.

Mortgage.

Practice in Equity.

**1—Bill filed by Administrator against executor for an account of estate—No complaint in lifetime of Administrator of estate—Not keeping separate accounts—Exceptional circumstances—Right to call for an account.**

W. C. was the administrator of the estate of W. H., and previous to the year 1824 sold a considerable portion of

the estate for payment of debts : in that year partition was made among the heirs of W. H. (the mother of W. C. being one) of the remainder of the estate. At that time W. C.'s mother was a widow, residing with her son, and having a considerable property, both in her own right as one of the heirs of her father, and also under the will of her husband. W. C. also had an equal share with his mother under his father's will, of which he was sole executor, and he had the entire management and control of his mother's property, and was her confidential adviser in all matters of business. For several years, regular and full accounts were made up annually of the receipts and expenditure by W. C. on account of his mother, though it did not appear that those accounts had been rendered to her ; but about the year 1836 he ceased to keep any separate accounts of her estate. At this time W. C. was in receipt of a large official income, and kept up a well-appointed household, of all the comforts of which his mother partook equally with him. In 1848 she made a will, bequeathing all her personal estate to W. C., and devising her real estate to another relative. W. C. died without issue in 1851, before his mother, and consequently the bequest to him by her will lapsed. A bill was filed by her administrator against his executors for an account of the estate of W. H., which had come to the hands of W. C. as administrator ; and also for an account of all moneys received by him as agent of his mother up to the time of his death. *Held*, 1st. That as no complaint had ever been made during the lifetime of W. C., it might be presumed that the heirs of W. H. were satisfied with his administration of the estate, before they executed the deed of partition in 1824, and therefore his estate was not liable to account. 2nd. That though under ordinary circumstances the fact of a fiduciary agent or trustee not keeping separate accounts of the trust-moneys would be regarded with suspicion in a Court of Equity ; this, from the peculiar relation of W. C. and his mother, and the terms of affection and confidence in which they had lived together was an exceptional case ; and that, in the absence of any evidence that advantage had been taken by him of his posi-

tion, and of the confidence reposed in him, or that he had kept his mother in ignorance of what was necessary to be known for her protection, or of any information which would be likely to induce her to abstain from merging her income in his, the abandonment of the separate accounts in 1836, acted on up to the death of W. C., put an end to all right on the part of his mother or her representative to call for an account of her estate. *Botsford v. Hazen*, 5 All. 28.

**1 a—Executor's accounts—Impeaching agreement—  
Liability as stockholder—Knowledge of agent—  
Trustee holder of stock, entitled to indemnity.**

A. died in 1853, having appointed B. his executor. B. proceeded to collect the assets of the estate, and invested part of them in bank stock in his own name, as executor, the dividends of which were credited to the estate from time to time; but before the estate was fully settled, and before he had rendered any account of his administration, he died, leaving C. his executor. After this, in 1863, the widow of A. obtained administration *de bonis non* on his estate, and left the Province, appointing C. her agent; who managed the estate of A., collected the remaining assets, and received the dividends from the bank stock, and paid or credited the amounts to the widow. A full inventory of the estate of A., shewing the bank stock and other investments, was made under the direction of C. and filed in the Probate Court, and a copy sent to the widow, to which she made no objection. In 1866, the widow and residuary legatees of A. returned to the Province for the purpose of having the estate settled: they claimed to be entitled to an account of B.'s administration, which C. said he could not furnish, but offered to produce B.'s books for their examination. C. claimed a considerable sum from the estate for B.'s services as executor of A., which the widow and legatees refused to allow. After a good deal of negotiation, an agreement was entered into between the widow and the legatees of A. of the one part, and C. as executor of B. on the other part, reciting all the facts and the claims on both sides; that no accounts had been rendered by B., or

by C. as his executor, since his death ; that legal questions might hereafter arise as to the liability of B. as executor, which all parties were desirous of avoiding ; and in order to arrive at an immediate settlement of all questions arising out of the administration of the estate it was agreed (*inter alia*) that all money, deeds, notes, bank stock, securities, books, etc., belonging to the estate of A. should be delivered up by C. to the widow of A. at a certain time ; and that the estate of B. and his heirs, etc., should be released and discharged from all liability in connection with the administration of A.'s estate. In pursuance of this agreement, C. delivered to the widow all the securities, certificates of bank stock, books, etc., belonging to A.'s estate, and she afterwards received the dividends of the bank stock, though the stock was not transferred to her in the books of the bank. In 1867 the bank suspended, and proceedings having having been taken to wind up its affairs, under the Act 27 Vic. cap. 44, C. (as the holder of the shares) was placed on the list of contributories and compelled to pay \$7000 as an assessment on the shares. The widow and legatees having refused to pay this sum to C. and to indemnify him against any further calls on his shares, a bill was filed to compel them to do so, and to obtain a decree that the agreement was valid and binding. On the hearing, the defendants claimed to shew that the agreement was fraudulent ; that they were compelled to enter into it in order to get possession of the assets of the estate, and because they could not get any accounts of the administration. *Held*, 1st. That B.'s accounts as executor were not in issue, and that if the defendants wished to impeach the agreement, they should have filed a cross bill. 2nd. That the widow of A. had the means of knowing her liability as a stockholder in the Bank, and was bound by the knowledge of her agent. 3rd. That C. only held the Bank stock as a trustee for the widow, and was entitled to be indemnified for any calls made upon him as the holder of the stock, under the Act 27 Vic. cap. 44. Decree made against the defendants according to the prayer of the bill. *Botsford v. Crane*, *East T.* 1873.



**2—Remedy at law—Suit for specific performance not maintainable.**

The defendants D. F. & S., entered into partnership in 1866, for purchasing and selling shingles and clapboards. D. resided in Fredericton, and the other defendants in Boston. D. was to purchase the shingles, etc., and ship them to F. and S., who were to control the sales, and the proceeds were to come to them: the capital to be furnished equally by the parties, and the profit and loss to be equally divided. D. being unable to furnish his share of the capital, applied to the plaintiff in February, 1866, who agreed to make advances to him on condition that he should ship shingles, etc., to the plaintiff to secure him, D. agreeing (with the assent of F. and S.) to ship every alternate cargo to him for that purpose. The plaintiff claimed that the money was advanced to all the defendants; but F. and S. denied this, alleging that it was made to D. alone, and that they did not require it, having sufficient means to furnish their share of the capital; they also claimed that the amount to be advanced by the plaintiff was limited to \$20,000, and that the shipments to him by D. were sufficient to cover that sum. *Held*, That even if the amount was not limited, the agreement gave the plaintiff no lien on the partnership lumber; that if there was a breach of the agreement, the plaintiff had a remedy therefor at law, and therefore he could not maintain a suit for the specific performance of it. *Fogg v. Dowling, Trin. T. 1870.*

**2 a — Remedy in equity for specific performance — Adoption of agreement — Relation of trustee and cestui que trust created.**

M. being indebted to the plaintiff for logs and lumber, and to others in various amounts, and being also largely indebted to the defendants, gave them a warrant of attorney to confess judgment, subject to a defeazance, stating that it was given to secure the defendants in the amount due them from M., and in all sums which they might pay under a certain agreement then made between them. By this agreement the defendants undertook and agreed to pay

(*inter alia*,) by three instalments, all balances due by M. on logs and timber delivered to him since a certain day, the amounts to be fixed by orders drawn by him on the defendants: the defendants have power to issue execution on the judgment forthwith, and sell all the real and personal estate of M., and after paying all expenses, to retain the proceeds till the purposes of the agreement were satisfied, and if any surplus remained, to pay the same to M. The plaintiff and M. having settled the amount due plaintiff for lumber, M. drew an order on the defendants for the amount, which order was presented to the defendants, and the first instalment paid to the plaintiff, and endorsed on the order. When the second instalment came due, the defendants refused to pay, because M.'s property, sold under the judgment, fell short of what he had represented, and was insufficient to pay the several amounts mentioned in the agreement. *Held*, 1st. That the plaintiff having assented to, and acted upon the agreement between the defendants and M., the relation of trustee and *cestui que trust* was thereby created. 2nd. That the defendants were absolutely bound by the agreement to pay the plaintiff the amount stated in the order; and 3rd. That the plaintiffs had a remedy in equity for a specific performance of the agreement. *Pickard v. The Central Bank*, 5 All. 472.

**3—Deposit of policy of insurance—Mortgage right—Equitable claim perfected.**

Defendant mortgaged a house to A. to secure a debt, and covenanted to insure a certain sum on the house, and, if required, to assign the policy to A. Defendant insured the house, but afterwards becoming indebted to B., and being pressed for payment, deposited the policy of insurance with B. as collateral security. B. had no notice of A.'s mortgage. On the 5th March, a few days after the deposit of the policy with B., the house was burnt. On the following day A. gave notice to the Insurance Company of his mortgage, and claimed the amount of the insurance: he also applied to the defendant for an order to the Insurance Company to pay the amount, but the defendant de-

clined to give it, stating that he had already appropriated the money to the payment of his debt to B. On the 21st March, B. presented the defendant's order on the Insurance Company for the amount of the insurance, and claimed payment. *Held*, That A., by giving notice to the Company of his equitable claim under the mortgage, had perfected his right to the insurance money, and had priority over B., notwithstanding the deposit of the policy with him. *The Queen Insurance Co. v. Macpherson, East. T. 1868.*

**4—Property taken subject to covenant—Knowledge of party—Equitable rights—Specific performance—Restraining by injunction until fulfilment of covenants—Remedy at law not ousting jurisdiction of equity—Agreement for compensation—Statutory remedy for assessment not applicable.**

If a party takes property, with knowledge that the person through whom he claims has covenanted to use it in a particular way, he takes it subject to the equity created by that party; and a specific performance of the agreement will be enforced against him. *Ryan v. Lockhart*, 1 *Pug.* 127.

The St. John Water Company, under the authority of their Act of Incorporation, 2 Wm. IV. cap. 26, covenanted with the owner of land, which they required to overflow, that they would build a bridge over the overflowage to enable him and his assigns, etc., to pass from one part of his farm to the other, and would keep the bridge in repair so long as the overflowage continued. The bridge was built and kept in repair until all the rights and property of the Company, subject to the outstanding liabilities, were vested in Commissioners (the defendants) by Act 18 Vic. cap. 38; saving to every person all rights and remedies in law or equity, and all actions or suits pending, or thereafter to be brought against the Company for or by reason of any malfeasance or misfeasance, or any act done or committed, or by reason of any contract or agreement theretofore made, which rights and remedies should continue as if the Act had not been passed. The defendants continued the overflowage, but refused to keep the bridge in repair. The plaintiff having become the owner of the land, filed a bill

for specific performance of the covenant, and to restrain the defendants from overflowing his land. *Held*, 1st. That the defendants, having taken the property of the Water Company subject to the outstanding liabilities, were bound by the covenant to keep the bridge in repair. 2nd. That the reservation in the Act of rights and remedies against the Company only applied to actions pending, and rights of action accrued before the passing of the Act; and not to a breach of contract, or wrong done, by the Commissioners, though such contract had been entered into by the Company. 3rd. That the plaintiff had a remedy in equity against the Commissioners for a specific performance of the covenant, and that they should be restrained by injunction from overflowing his land until the bridge was put in a proper state of repair. 4th. That though the plaintiff might have a remedy at law on the covenant, that did not oust the jurisdiction of equity. 5th. That the mode of compensation for the overflowage having been agreed upon between the Company and the owner of the land, the statutory remedy of assessment by a jury did not apply. *Ryan v. Lockhart*, 1 *Pug.* 127.

**5—Contract with Society supposed to be incorporated  
—Personal liability—Estimate of work not an  
award—Not affected by consideration of matters  
not referred—Concurrent Remedies—Objection to  
jurisdiction—Time of taking.**

Plaintiff entered into a contract with the York County Agricultural Society to erect a building within a specified time, for a certain sum, and by the terms of the contracted the Society, if dissatisfied with the progress of the work was authorized to take possession of and complete the building, and charge the expense to the plaintiff. The contract was under a seal represented to be the corporate seal of the Society, and it was declared that the members of the committee of the Society (who managed the business) should not be personally or individually liable to the plaintiff. The building was not completed within the time agreed, and the Society took possession, and proceeded with

the unfinished work. It was afterwards agreed that the unfinished work, to complete the building according to contract, should be estimated by two mechanics, one chosen by each party, and that from the sum determined by them as necessary for that purpose, the Society should deduct a certain sum, and charge the balance to the plaintiff. This was done, and after making all deductions, a balance was due plaintiff on the contract. The Society never was in fact incorporated, and the plaintiff failed to recover the balance in an action at law against the Society. *Held*, 1st. That there being no Company liable on the contract, the members of the Committee of the Society, who had taken the benefit of the plaintiff's work, were personally liable. 2nd. That the clause in the contract against their personal liability was only intended to apply in case there was a Corporation liable on the contract, and there not being any such liability, it was repugnant and void. 3rd. That the estimate of the unfinished work was not an award in the legal sense of the word, but a mere valuation or appraisement, and therefore was not invalid in consequence of the arbitrators having taken into consideration matters not referred to them—it being substantially a decision of what was referred. 4th. That though the plaintiff might have had a remedy at law against the defendants, it did not follow that there was not a concurrent remedy in equity; but at all events, the objection was too late at the hearing, and should have been taken by plea on demurrer. *Hodge v. Reid, Mich. T. 1871.*

**6—Judgment Creditor—Remedy at law before application in equity.**

A judgment creditor cannot file a bill in equity to enforce his judgment against the land of his debtor until he has taken the necessary proceedings to enforce his judgment at law, and is unable there to obtain the relief to which he is entitled. *Black v. Hazen, Hil. T. 1871.*

**7—Bill in equity—Allegation—Interest in subject of suit.**

An allegation in the bill, that the plaintiff had pur-

chased the rights of two of the heirs, and obtained conveyance thereof, shows a sufficient interest in the subject matter of the suit. *Coy v. Coy*, 1 *Han.* 177.

**8—Foreclosure of mortgage after death of mortgagee.**

In a suit for foreclosure of a mortgage in fee, after the death of the mortgagee, the bill must show in whom the legal estate is vested. Alleging that the plaintiff is executor and trustee of the mortgagee is not sufficient. *Wiggins and others v. Floyd*, 1 *Han.* 229.

**9—Bill for payment of legacy.**

In a suit to obtain payment of a legacy; *Quære*, Whether, if the bill shows the personal estate insufficient for payment of the debts, it must not also show that the legacy was charged on the land, if the plaintiff seeks payment therefrom. *Wallace and Wife v. Woods*, 1 *Han.* 230.

**10—Plaintiff purchasing property without leave to bid at sale.**

The plaintiff in a foreclosure suit may purchase the property at a sale under the decree, without having obtained leave to bid at the sale. The want of such leave is only an irregularity. *Goshin v. Phoenix Insurance Company*, 6 *All.* 429.

**11—Foreclosure—Mortgagor having no interest—Plaintiff's neglect of knowledge—Costs.**

A mortgagor was made defendant in a foreclosure suit, appeared thereto and answered, disclaiming any interest in the property. On motion to dismiss the bill as against the mortgagor—*Held*, That as the plaintiff either knew or had the means of knowing before commencing the suit, that the mortgagor had conveyed away his equity of redemption in the property, the mortgagor was entitled to his costs. *Wilson v. Hornbrook et al.* 1 *Han.* 167.

**12—Mortgage—Payments—Liability of land mortgaged.**

A. the father, and B. and C. his sons, being joint owners of two lots of land, mortgaged them to the plaintiff. A.

afterwards conveyed to the plaintiff land of which he was sole owner, in payment of half the mortgage debt, and then released all his interest in the mortgaged lands to B. and C., who occupied the land in common for several years, and made several joint payments to the mortgagee on account of the mortgage debt. B. and C. afterwards divided the land equally between them by deed of partition. In a suit for foreclosure of the mortgage, B. claimed that as between himself and C., his portion of the land had been released by the mortgagee at the time A. conveyed the land to him, and that C.'s lot should be first sold to satisfy the mortgage. *Held*, 1st. That in the absence of any written agreement by the mortgagee, the whole of the land remained equally liable to the mortgage, and should be sold in one lot. 2nd. That if a verbal agreement, and the appropriation of the payment by A., would be sufficient to release a particular part of the mortgaged lands, it would not bind C. who was no party to it. 3rd. That the subsequent partition of the land between B. and C., in ignorance by the latter of the agreement by which the portion of the land allotted to B. was to be released from the mortgage, was a fraud upon C., and that such agreement would not be carried out for B.'s benefit. *Johnston v. McCartney and others*, 1 *Han.* 220.

**13—Trustee and cestui que trust—Validity of Agreement between—Practice—When Cross Bill Necessary—Admissibility of Evidence to Impeach Agreement without Cross Bill—Limitation of the Rule that “He who would have Equity must do Equity”—Liability of Equitable and Beneficial Owner of Stock, to repay calls paid by Legal Owner whose name is placed on List of Contributors under the Winding Up Act, (1864).**

C. F. A. and J. F. A. were executors of W. C. C. F. A. died, having appointed J. F. A. and H. B. A. his executors; J. F. A. also died before the affairs of W. C.'s estate were wound up, having appointed H. B. A. and M. A. his executors. After the death of J. F. A., E. C., widow of W. C., became administratrix, *cum testamento annexo* of W. C.'s.

estate. During the joint management of the estate by C. F. A. and J. F. A., as well as during the sole management of J. F. A., large sums of money, the property of the estate, were collected and invested. The sum of £3,570 9s. 5d., representing 140 shares, was invested in Westmorland Bank stock. This stock stood in the books of the bank in the name of C. F. A. and J. F. A., executors. It was always treated as part of W. C's estate. It was enumerated as assets of the estates in the inventory filed in the Probate Court by H. B. A., then acting as agent of administratrix, the receipt of a copy of which inventory she duly acknowledged. While this stock was yet good and selling above par, the representatives of the estate of W. C., on the one side, and the representatives of the estate of C. F. A. and J. F. A., on the other side, (difficulties having arisen between them), entered into an agreement for the settlement of all disputes and the avoiding of legal questions regarding the administration of the estate by C. F. A. and J. F. A., by which, among other things, the estates of C. F. A. and J. F. A. were released from liability regarding the administration of the estate of W. C., and the representatives of the estate of C. F. A. and J. F. A. undertook to transfer to E. C. all the property of the estate then in their hands. The books of accounts and securities were handed over. Among the rest was this Bank of Westmorland stock, of which the certificates were handed over to E. C's agent, but the transfer was not made on the Bank books. E. C's agent at one time applied to H. B. A. to have the transfer made, but H. B. A. refused, on the ground that the President was in England and the transfer could not be made. This was on the 17th of January, 1867. On the 24th of the same month E. C's agent, on an order signed by H. B. A., received the dividend due by this stock and placed it to the credit of W. C's estate. No other or subsequent demand was made to have the stock transferred. In March following the bank suspended payment. In May a curator was appointed under the Winding up Act, (1864). The estates of C. F. A. and J. F. A. were placed upon the list of contributories and were obliged to



pay the amount of a call of fifty per cent., (the amount being \$7000). The plaintiffs (the representatives and parties interested in the estates of C. F. A. and J. F. A.) called upon E. C., administratrix of W. C's. estate, and the other defendants as the parties interested in W. C's. estate, to repay the \$7000 and to indemnify them against further calls. The defendants refused, and this suit was brought. The defendants alleged that the agreement was not valid or binding, that there was no consideration for it, and that it was entered into under circumstances that rendered it fraudulent and void and of no effect, but did not file a cross bill to set it aside. On the hearing in the Court below, evidence regarding the administration of W. C's. estate by C. F. A. and J. F. A. that was offered for the purpose of impeaching the agreement, was received. *Held*, (by Ritchie, C. J., and Fisher, J., Westmore, J., *dissentiente*,) reversing the judgment of the Court below, that the agreement could not be impeached in this suit without filing a cross bill, and that the evidence regarding the administration of the estate was improperly received.

That the rule that "he who would have equity must do equity," must be restricted to the matter in which the assistance of the Court is asked.

That this agreement was valid and conclusive against the defendants in this suit, and that E. C., administratrix, &c., of W. C's. estate, being equitable and beneficial owner of the stock in question, should repay the plaintiffs the sum so paid by them on account of the stock, and indemnify them against further calls. *Botsford et al., v. Crane et al.*, 1 P. & B. 154.

#### 14—Answer in Equity—Practice.

An objection that a suit is defective for want of parties, cannot be taken on the argument of exceptions to the defendant's answer. *Hendricks v. Hallet*, 1 Han. 185.

In answering interrogatories, the defendant must confess, or traverse the substance of each charge in the bill. Particular charges must be answered particularly and precisely, and not in a general manner. *Ibid.*

Where defendant is interrogated as to the receipt of particular sums of money, it is not sufficient to refer to an account annexed to his answer, as shewing what he had received, unless he states that it is the best account he can give. *Ibid.*

If he states that an account annexed to his answer, contains all the information he is able to give on a particular question, it is sufficient; though it was his duty to have kept a more particular account. *Ibid.*

Defendant is bound to answer an interrogatory if it is pertinent to the case made by the bill, though it is not founded on any specific charge in the bill: and *Semble*, That he should answer an interrogatory whether it is material or not. *Ibid.*

Defendant, filling the offices of trustee and executor, is bound to answer an interrogatory, whether his accounts distinguish the receipts and charges as trustee, from those as executor. It is not sufficient to refer the plaintiff to the accounts. *Ibid.*

Defendant is bound to answer as to his own transactions, and, if necessary to obtain information to enable him to do so; but he is not bound to seek information as to transactions not his own, and of matters equally accessible to the plaintiff. *Ibid.*

As a general rule, if defendant professes to answer, he must do so fully; and he cannot protect himself from the consequences of an insufficient answer, by objecting that the interrogatory is not warranted by the bill, or that the plaintiff has no equity. *Ibid.*

An answer which states a conclusion of law, is insufficient. *Ibid.*

When an answer denies or ignores a matter inquired after, it must be as to the defendant's knowledge, information or belief. *Ibid.*

Defendant may be interrogated as to the contents of writings, decrees, etc. *Ibid.*

Where the discovery would be material to the case made and the relief prayed by the bill, a defendant may be interrogated as to the amount of his property, and his ability to pay; but he is not bound to answer a mere hypothetical interrogatory. *Ibid.*

**15—Time allowed to answer.**

A defendant is entitled to a month to answer after filing of the bill; and notice of motion to take the bill *pro confesso* cannot be given till the expiration of that time, though a copy of the bill and interrogatories may have been served on the defendant more than a month before the notice. *Godfrey v. Oglesby*, 1 *Han.* 281.

**16—Amendment—Death of Defendant.**

Where one of the persons named as defendants in a suit had died before the summons issued, the pleadings were amended by striking out his name, and the answer was re-sworn. *Byers v. Harrison*, 1 *Han.* 233.

**17—Adding Plaintiffs—Further allowance of time to Answer.**

Where an amendment was made in a foreclosure suit, by adding plaintiffs after the filing of the bill, the defendant was allowed a month to answer after service of the order to amend, and of a copy of the amended bill. *Wright v. Evanson*, 1 *Han.* 232. See Supreme Court in Equity.

**Letters Referred to in Defendant's answer in Equity—Allowance and use of same.**

See *Insolvent Act. McLeod v. McLeod.*

**EQUITY APPEAL.**

See Supreme Court in Equity.  
Practice in Equity.

**EQUITY OF REDEMPTION.**

See Equity.

**Purchase of, by Mortgage—Effect.**

See Mortgage 17.

**Absolute Conveyance—Security for Debt—Sale with consent of debtor.**

Where a person holds the property of another by an absolute conveyance, but really as security for a debt, and he sells it with the consent of the debtor, the latter cannot afterwards claim an equity of redemption against the purchaser, even though he was aware of the original trust. *Sutherland v. Meehan*, 3 *Pug.* 239.

**Ejectment by holder of Equity of Redemption—Defence by Tenant of Mortgagee.**

See Ejectment II., 11. *Doe dem. Smith v. Snarr.*

**ERROR (WRIT OF).****1—If it lies for not awarding judgment non obstante veredicto.**

*Quere*, Whether a writ of error lies for not awarding judgment *non obstante veredicto*, particularly where the Court below might have awarded a repleader; or whether the Court of Error may award such judgment *non obs. veredicto*? *Kinnear v. Gallagher*, 1 *Kerr* 424.

**2—Mistake in entry of warrant of Attorney on roll—Taking advantage of.**

A mistake in the entry of the warrant of attorney on the roll, and in the *incipitur* of the judgment in stating the action to be "trespass on the case," instead of "debt," cannot be taken advantage of on the general assignment of errors. *Ibid.*

**3—Application to amend, pending writ of error.**

Pending a writ of error, the Supreme Court may allow application to be made to the Court below to amend formal errors on the record, and may suspend judgment in the meantime. This was allowed where the award of the *venire* and the day of trial were left blank in the record below. *Ibid.*

**4—Objection must be taken in Court out of which writ issued.**

No objection can be taken to a writ of error in the Court below: it must be made in the Court out of which the writ issued. *Coffin v. Marsh*, 3 *Kerr* 427.

**5—Rule to assign errors is a four day rule—Double costs—Delay in assigning error.**

The rule to the plaintiff in error to assign errors, is a four day rule—the English practice not having been altered by rule of this Court. *Gilbert v. Sayre*, 2 *All.* 512.

If judgment is affirmed after error assigned, the defendant in error is entitled to double costs, under the Statute 13 Car. II., cap. 2, sec. 10. *Ibid.*

*Quære*, Whether the defendant is entitled to such costs where the writ of error is *non proseed.* *Ibid.*

A plaintiff in error not having assigned errors, the defendant, after the lapse of nearly nine years, issued and served on the plaintiff in error *scire facias qu. executionem non*, and a rule to assign errors. The plaintiff not having assigned errors, the defendant signed judgment on the *scire facias*. Court refused to set aside this judgment after the expiration of a term, but granted a rule to shew cause why the plaintiff in error should not be allowed to assign errors in bar of judgment of *non pros.* *Ibid.*

**6—From what Court should issue.**

A writ of error to remove a cause from the Court of Common Pleas into this Court should issue out of the Court of Chancery; and if issued out of this Court it is a nullity. *Mills v. Vail*, 4 *All.* 239.

**7—Filing of—Time.**

An assignment of errors cannot be filed till after the return of the writ of error; and a *scire facias ad audiendum errores* issued before the return of the writ of error will be set aside for irregularity. *Wetmore v. Levy*, 4 *All.* 502.

**8—On judgment of Inferior Court—Matter ex debito justitiæ.**

A writ of error on the judgment of an Inferior Court, being grantable *ex debito justitiæ* can only be taken away by the express words of an Act of Assembly; and therefore it lies on summary judgments in the Court of Common Pleas. *Wetmore v. Levy*, 4 *All.* 510.

A writ of error to remove a cause from the Common Pleas, should issue out of the Court of Chancery, be tested in the name of the Lieutenant-Governor, and be returnable at Fredericton. *Ibid.*

**9—Affirmance of judgment—Interest—Notice necessary.**

Notice should be given of an application to be allowed interest on the affirmance of a judgment in error. *Mills v. Vail*, 4 *All.* 629.

**10—Issuing of writ *sci. fa. ad. aud. errores*.**

It is not necessary that a *scire facis ad audiendum errores* should issue of the same term in which the writ is returnable. *Wetmore v. Levy*, *Hil. T.* 1861.

**ESCAPE.**

**On final process—Measure of Damages.**

*See Damages I. 12.*

**1—Right to issue *fi. fa.* after escape.**

The recovery of judgment in an action against the Sheriff for an escape, unless it produces satisfaction, does not destroy the plaintiff's remedy against the debtor. After an escape from execution, the judgment creditor may issue a *fi. fa.* against the debtor's property. *Kelly v. Wilson*, 2 *All.* 475.

**2—Application by bail to render after escape.**

If a debtor escapes from the limits, and his bail apply to be relieved on rendering him to jail, under the Act 13 Vic. cap. 30, such relief will only be granted on condition of his being rendered to the jail whence he escaped. *Peters v. Perley*, 2 *All.* 585.

**3—Damage—Attachment for non-payment of costs is in the nature of mesne process.**

An attachment for non-payment of costs is in the nature of mesne process, and the Sheriff is not liable for the escape of a person in custody on such process, unless the plaintiff has sustained actual damage or delay in consequence of the escape. *Atkinson v. Mitchell*, 6 *All.* 345.

**4—Sheriff—Justification—Order for discharge.**

The production of an order of a Judge of a County Court, valid on its face for the discharge of a debtor, under the 1 Rev. Stat. cap. 124, is a justification to the Sheriff in an action for the escape of the debtor; and he is not bound to prove the regularity of the previous proceedings. *Clementson v. Coombes, East. T. 1871.*

**Prisoners delivered over by old Sheriff to new—Chargeable for escape.**

*See Sheriff 13.*

**Debt—Action of, against Sheriff for escape, not maintainable.**

*See British Statutes 3.*

**Action on limit bond for escape—Assignment of first bond—Taking second bond.**

*See Bond II. 9.*

**ESCROW.**

*See Deed I. 33.*

**ESTATE.**

*See Deed.*

Mortgage.

Landlord and Tenant.

Tenant at will.

**ESTOPPEL.**

I. BY ACTS—CONDUCT—ADMISSIONS.

II. ACQUIESCENCE.

III. OPENING UP OF ESTOPPEL.

IV. MISCELLANEOUS.

**I.**

BY ACTS—CONDUCT—ADMISSIONS.

**1—Leasing premises—Setting up title in a third person afterwards.**

**Ejectment.** By indenture bearing date 1st May, 1829, the land in question was leased by the lessor of the plaintiff to the defendant for two years, at the rent of £6; the

defendant remained in possession several years after the expiration of the lease, but there was no proof of payment of rent. *Held*, That notwithstanding this, and that the defendant had not been actually let into possession by the lessor of the plaintiff, yet he was estopped from denying his right to lease, and from setting up a title in a third person at the time of making the lease, under whom the defendant was entitled to claim, there being no proof of fraudulent misrepresentation or concealment to mislead the defendant when he accepted the lease. *Doe dem. Sands v. Phillips*, 1 Kerr 86.

**2—Running boundary lines by Surveyor mutually chosen—Acquiescence.**

Where a boundary line has been run between adjoining proprietors of land by a surveyor, mutually employed by them, and acted upon for a number of years, and improvements and subsequent conveyances made according thereto. *Held*, That the parties were bound by it, although it proved to have been run very incorrectly, and to deviate materially from the description of the boundaries in the title deeds under which the parties were holding, and to give the defendant 150 instead of 100 acres of land. *Doe dem. Carr v. McCulloch*, 1 Kerr 460.

**3—Accepting lease.**

Where B., being in possession of land, accepted a lease of the same from A., who claimed title thereto. *Held*, That B., was thereby estopped from denying A.'s right to the possession at the termination of the lease, no other person having interfered with B.'s holding under the lease, and no fraud or deception having been practised by A. in order to induce B. to accept the same. *Doe dem. Sands v. Phillips*, 1 Kerr 538.

**4—Agreement and pleading—Corporation.**

The defendant being sued as a Corporation, and appearing and pleading and as such in bar to the action, is estopped at the trial from disputing its existence as a body corporate, and its ability to contract in that capacity. *Seelye v. Lancaster Mill Company*, 1 Kerr 377.



**5—Payment of Rent—Outstanding title.**

The plaintiff being in possession of land, a grant of it was made by the Crown to the Rector, Churchwardens and Vestry of W., of which the Rector informed the plaintiff, who agreed to hold the land from the Rector at an annual rent, and paid the rent two or three years. *Held*, That the plaintiff could not dispute the Rector's title by shewing a previous grant of the same land to B., through whom he did not profess to claim. *Hughes v. Holmes*, 1 *All.* 12.

6—After a conveyance of land made by a person of unsound mind, a tenant for years, of the land paid, rent to the grantee. *Held*, After the death of the tenant that his widow was estopped by the payment of rent, from denying the title of the grantee. *Doe dem. Hickman v. King*, 1 *Han.* 330.

**7—Agreement under Seal—Payment—Explanation of delivery of goods.**

By agreement, under seal, between the plaintiff and B., the latter agreed to purchase a vessel, then building by the plaintiff, and to pay him a certain sum per ton when the vessel was launched, \$1,400 which had been advanced to the plaintiff, to be deducted from the purchase money. In an action on the agreement for the price of the vessel, the defendant under notice of set-off, claimed payment for goods delivered to the plaintiff, subsequent to the agreement. *Held*, That the plaintiff was not estopped by the agreement from showing, in answer to the set-off, that the goods were not delivered as an additional payment on account of the vessel, or as a sale, but on account of the \$1,400, which sum was not paid at the date of the agreement. *Bishop v. Robinson and others, Executors of C. E. Bishop*, 1 *Han.* 68.

**8—Entering into recognizance—Cannot plead fraudulent representation as to.**

The sureties in a recognizance entered into under the Rev. Stat. cap. 98, "Of Controverted Elections," cannot plead that they entered into it by a fraudulent representa-

tion of the nature of it, believing it to be the obligation of the principal only. *The Queen v. Sparrow and others*, 1 *Han.* 118.

If the recognizance was obtained by fraud, the sureties should apply to the Court to vacate it; but while it stands as a record, they are estopped from denying the truth of it. *Ibid.*

#### **9—Purchasing at Sheriff's sale.**

Where property claimed by the plaintiff is seized by an execution against A., and the plaintiff forbids the sale, he is not, by purchasing at the Sheriff's sale, estopped from denying it was A.'s property. *Pelton v. Temple*, 1 *Han.* 275.

#### **10—Representations—Party acting upon.**

Where a party makes a representation to another, with reference to the title to lands, which induces him to alter his previous position and advance upon them, he is estopped from denying the truth of such representation. *See No. 27.*

#### **11—Adoption of Devise.**

Assenting to a devise and going into possession of land under the will, estops parties from setting up a new title in other party. *Ibid.*

#### **12—Giving Deed—Title at time.**

In ejectment against a mortgagor by a purchaser of the equity of redemption under a warranty deed, the defendant is estopped from showing that he had no title when he gave the deed; nor can he set up the title of the mortgagee in bar of the action. *Doe v. Power*, 1 *All.* 271.

**13**———In ejectment by mortgagee against mortgagor, to whom the land had been granted by the Crown, the defendant proposed to show that the land was paid for by his son, who occupied it as owner till his death. *Held*, 1st. That the mortgagor was estopped by his deed from saying that he had no title. 2nd. That such evidence was inadmissible on behalf of the son's widow, who defended the action jointly with the mortgagor. *Doe v. McDonald*, 1 *All.* 678.

· *Quære*, Whether an estoppel which binds one defendant, will bind another, because he has joined in the consent rule. *Ibid*.

**14—Admissions not made in connection with matter of action.**

The admissions of a party made to a stranger to the suit, are not conclusive upon him as an estoppel. Thus where the plaintiff stated to R. that property in his possession belonged to his brother, and thereupon issued an execution and seized the property, for which the plaintiff brought trespass. *Held*, That as the statements to R. were not made in connection with the subject of the action, they were not conclusive on the plaintiff. *Murray v. Johnston*, 1 All. 409.

**15—Corporation entering into contract.**

A Municipal Corporation with certain defined powers, is not by entering into a contract under seal, estopped from shewing its incapacity to make such a contract. *Jamieson v. The City of Fredericton*, 2 All. 128.

**16—Assent to mortgage of cattle.**

The plaintiffs, living with their father, assented to his mortgaging and delivering cattle to the defendant, as security for a debt due from him. *Held*, in trover against the defendant, That the plaintiffs were estopped from setting up title in the cattle. *Lyon v. Perkins*, 2 All. 375.

**17—Purchase money in deed—Receipt of.**

*Quære*, Whether one who has conveyed land and acknowledged in the deed the receipt of the purchase money, can recover a balance unpaid, on an admission by the purchaser that he owes it. *McAllister v. Day*, 4 All. 37.

**18—Conveyance—Title after acquired.**

S. conveyed to the defendant by deed poll of bargain and sale, land of which he had neither title nor possession, but he afterwards acquired a title, which was purchased by the plaintiff at Sheriff's sale, without notice of the prior

conveyance. *Held*, 1st. That the defendant had no estate by estoppel. 2nd. That the plaintiff, not claiming under, or recognizing the deed to the defendant, was not estopped as a privy in estate with S. from setting up the legal title which S. had acquired since the conveyance to the defendant.

*Quære*, Whether a deed poll will create an estate by estoppel. *Doe v. Wetmore*, 3 *All.* 140.

### **19—License—Disputing title—Disproving license.**

In trespass, the plaintiff proved that the defendant had gone on the land by his permission, and afterwards disputed his title. *Held*, That the defendant was not estopped from giving evidence to disprove the license, and to shew that he entered under a claim of right. *Hazen v. Bryson*, 3 *All.* 101.

### **20—Lease—Estoppel by—Third party.**

In ejectment against A. and B., the plaintiff proved possession of the land in 1827 ; that in 1835 he had ejected A. ; that in 1848 B. had leased the land from him for a year and paid rent, and that A. re-took possession immediately after being ejected. *Held*, That B. was estopped by the lease from disputing the plaintiff's title, but that A. was not estopped, and might shew title in a third person. *Doe v. Brown*, 3 *All.* 433.

After foreclosure, a stranger to the mortgage may dispute the title of the mortgagor. *Ibid.*

### **21—Landlord and tenant—Representation of title.**

The defendant obtained possession of land from the plaintiff's tenant, by representing that he had the title to it, and threatening to eject the tenant. *Held*, in an action of ejectment by the landlord, That the defendant was estopped from disputing his title, and setting up an adverse title in himself. *Doe v. Estey*, 3 *All.* 489.

### **22—Mortgage title of lessor—Ignorance of prior mortgage.**

One D. P. having mortgaged the premises in question

to the lessor of the plaintiff, after which the Church corporation, claiming the premises by a Crown grant, brought ejectment against B. R., who, about being evicted, compromised, and took a lease from the corporation, and then mortgaged such leasehold premises to one J. B., and J. B. mortgaged the same to the defendant, who entered; and while so in possession of part of the premises admitted that he had gone in under D. P., but referred to his mortgage from J. B., without any apparent knowledge of the mortgage from D. P. to the lessor. *Held*, That he was not estopped from contesting the mortgage title of the lessor. *Doe dem. Eels v. Garnett*, 3 Kerr 535.

**23—Counsel addressing jury.**

When in an action for negligence as a surgeon, the defendant's counsel, in addressing the jury, relies on his client's skill as a surgeon, he cannot afterwards object on a motion for a new trial, that there was no evidence that he was a surgeon. *Kelly v. Dow*, 4 All. 435.

*See Evidence I. (Admissions.)*

**24—Agreement to indemnify against loss—Acquiescence of plaintiff with defendant.**

Plaintiff purchased timber from J., which was seized under an execution issued by the defendant against J. An action having been brought by J. against the plaintiff, for the price of the timber, it was agreed between the plaintiff and defendant that the latter should indemnify the former against all loss, in case J. recovered in the action against him, which was defended on the ground that the timber was rightfully seized under the execution. J. recovered in the action, and the defendant paid the amount of the judgment. *Held*, That the plaintiff was estopped from afterwards setting up a right to the timber against the defendant. *Crocker v. Hutchison*, 5 All. 139.

**25—Admission of execution of bond.**

To a *scire facias* on a Crown bond, the defendant pleaded *non est factum*. *Held*, That evidence of an admission by him that it was his bond was not an estoppel; that he

might give evidence to prove that the supposed signature of one of the subscribing witnesses was a forgery; and that it was a question for the jury upon the issue raised, whether the defendants had executed the bond or not. *Reg. v. Roberston*, 6 *All.* 113.

**26—Sheriff's return—Particular action.**

A Sheriff's return to an execution is only an estoppel in the particular action in which the execution issued. *Miller v. Weldon*, 2 *Han.* 188.

**27—Representation—Title—Party lending money on faith of representation.**

S. B. being in possession of a tract of 300 acres of land, made a will devising 150 acres thereof to his son Robert, and 75 acres to his sons William and Thomas exclusively: the will was proved, Robert being one of the executors, and the three sons divided the land according to the will. Thomas afterwards applied to one M. to borrow money on the security of his portion of the land, and the three brothers then pointed out to M. their respective portions of the land, telling him that they held it under their father's will, and referring him to the County Records in order to see the will, and satisfy himself as to the title. In consequence of this, M. examined the will, and finding the property devised as they had represented to him, lent money to Thomas on a mortgage of his 75 acres. *Held*, That Robert and William, having acted under the will, and having by their representations induced M. to lend money to Thomas, were estopped from denying their father's title to the land, or that Thomas had a title under the will to the 75 acres; and that they could not, in an action of ejectment by the assignee of M.'s mortgage, set up title in themselves under a deed from the heirs of a third person to whom the land had been granted. *Doe dem. Armstrong v. Bridges*, *Mich. T.* 1869. (*See* 1 *Han.* 490.)

**Giving confession—Costs.**

*See Cognovit* 1.

**28—Judgment—Fraud.**

J. S., executor of the estate of A. S., gave a confession of judgment in a suit brought against him by the trustees of himself as an absconding debtor. On an application being then made by him to a Judge of Probates for a license to sell the real estate, the latter decided that the judgment was obtained by fraud, and refused to grant a license. *Held*, That the judgment was not conclusive, and fraud being shewn, the judge rightly decided to refuse the application. *Ex parte Simpson*, 2 *Pug.* 142.

**29—Replevin—Defendant's acts—Representation.**

In replevin plaintiff may shew that defendant by his acts is estopped from denying that the property in question is the plaintiff's; and if the alleged estoppel is *in pars*, it may be relied on in evidence without being pleaded. A mere representation of a fact will not amount to an estoppel unless it was made with the intention of inducing another party to act upon it, and he does act upon it and alter his position. *Hegan v. Fredericton Boom Co.*, 2 *P. & B.* 165.

**30—Reference to writing—Indenture.**

Where a party joins in an indenture which refers to another instrument approving of it, and treating it as a valid writing, he is thereby estopped from afterwards disputing the validity of the instrument so referred to. *Brown v. Moore*, 2 *Pug.* 407.

**Party accepting lease and entering under it and continuing in possession, estopped from disputing that lessor had no title to lease.**

*See Will. Knapp v. King.*

**Agreement made by agent as proprietor of land—Claiming under party with whom agreement made.**

*See Agreement II. Hersey v. Hatheway.*

**Dower—Release of—Property subsequently acquired.**

*See Dower. Doe dem. Burns v. McGraw.*

**Entries on books of account.**

See Evidence V. 11, 12. *Smith v. Andrews. Raymond v. Cumming.*

**Case of levy by Sheriff.**

See Execution I. *Brooks v. Palmer.*

**Shewing title to land.**

See Award. *Oliver v. Elliott.*

## II.

## ACQUIESCENCE.

**1—Of Judgment Debtor in Sheriff's sale—Title by estoppel not given.**

The acquiescence of the judgment debtor in a Sheriff's sale, and subsequent possession of the land by the purchaser short of twenty years, though presumptive evidence that all the necessary proceedings have been taken, will not give a title to the purchaser by estoppel. *Doe v. Hazen*, 3 *All.* 87.

**2—In sale of land—Agreement as to division line.**

The plaintiff claimed fifty acres of land under a deed in fee from his father J. B. in 1822, of a tract of 400 acres, which deed was subject to a condition that J. B. should receive and enjoy all the profits and emoluments accruing from the land during his life. J. B., in order to pay a debt, about two years after the conveyance to the plaintiff, and with his consent, caused the fifty acres to be sold by the Sheriff; the plaintiff bid at the sale, and afterwards agreed with the purchaser upon a division line between that and the remainder of the land. There was no proof of any judgment or execution against J. B., or of any advertisement by the Sheriff under which the land was sold. *Held*, That if the plaintiff had a present estate in the land at the time of the Sheriff's sale, his acquiescence in such sale would not divest him of his estate. *Doe v. Baxter*. 3 *All.* 282.

*Quære*, Whether the plaintiff took an estate *in presenti*



under the deed, or an estate in remainder after the death of his father? If the latter, *semble*, that his acquiescence in the sale and division of the land during his father's life would not operate as an estoppel *in pais*. *Ibid*.

**Nuisance—Plaintiff's presence while work proceeding.**

*See* Action on the Case III. 1.

### III.

#### OPENING UP OF ESTOPPEL.

**1—An estoppel by record must be pleaded if there is an opportunity of doing so, otherwise the truth may be shewn.**

*Weldon v. Weldon*, 2 *Han.* 188.

**2—An estoppel arising from an admission in a conveyance of land of the receipts of the purchase money, is opened by a bond from the purchaser to the vendor conditioned to pay such sum for the property as arbitrators should determine.**

*Coran v. Wheten*, *All.* 298.

### IV.

#### MISCELLANEOUS.

**1—Judgment against several—Non-service of process upon one—No knowledge of suit—Judge's order setting aside arrest in reply to judgment recovered.**

A judgment was obtained against A. and two others, without service of process on A., or his having any knowledge of the suit. (An attorney retained by the other defendants having appeared for A. also.) He was afterwards arrested on a *ca. sa.* issued on the judgment, and was discharged by a Judge's order on an affidavit denying knowledge of the suit and of any authority to the attorney to appear for him. *Held*, in an action for false imprisonment against the plaintiff in that suit, That A. was not estopped by the judgment from denying his liability; but that in reply to the plea of Judgment recovered, he might shew the Judge's order setting aside the arrest. *Salis v. Ferguson*, *Hil. T.* 1861, 5 *All.* 110.

**1—A party relying on a judgment recovered as an estoppel should plead it so that the plaintiff may take issue upon it.**

Where a judgment is not pleaded as an estoppel, but the facts relied on are stated in a notice of defence given under the Act 13 Vic. cap. 82, it is open to the party to find the truth of the facts on which the plaintiff relies as an answer to the judgment and execution. *Ibid.*

**2—Judgment on scire facias.**

A judgment on *scire facias* in proceedings in bastardy, under 1 Rev. Stat. cap. 57, is conclusive while it stands, and the defendant cannot object that the amount of costs is excessive. *Reg. v. Carson, Hil. T. 1866.*

**3—Judgment in defended cause—Filing papers—Motion to set aside—Defendant estopped from taking advantage of papers not being filed.**

*Lynnot v. Seelye, 1 All. 35.*

**4—Bail.**

*Quere,* Whether an application by bail for relief, under 1 Rev. Stat. cap. 124, estops them from afterwards applying to defend on the merits. *See Rippey v. Austin, 4 All. 77.*

**5—Bills and notes.**

Indorser, non-joinder in indorsement of joint payee, cannot be set up by payee who indorsed. *See Bills and Notes V. 21.*

**Indorser delivering note to bank, cannot set up forgery of signature of maker. }**

*See Bills and Notes V. 28.*

**Carrier—Master of ship—Not estopped by bill of lading.**

*See Carrier 1.*

**Consent rule—Plaintiff not estopped by.**

*See Ejectment VII.*

**6—Corporation,**

Presumption of letters patent being properly issued, title of corporate body being recited in instrument, and consent rule by party making objection. *See* Corporation 7. *Supra.* I. 4.

**Crown grant—Bounds—Reference to other grants.†**

*See* Crown Grant 8.

**7—Evidence.**

Plaintiff relying on estoppel, defendant taking possession under a written agreement, it must be produced. *See* Evidence VII. 3.

**Tenant by Courtesy—Disputing title of lessor.**

*See* Ejectment II.

**Covenant binding Assignee.**

*See* Covenant 7.

**EVIDENCE.**

- I. ADMISSIONS—DECLARATIONS—ACTS.
- II. JUDICIAL—OFFICIAL AND OTHER DOCUMENTS.
- III. PARTICULAR ACTIONS AND SUITS.
- IV. PARTICULAR FACTS.
- V. PAROL EXPLANATIONS.
- VI. PRESUMPTIVE EVIDENCE.
- VII. SECONDARY EVIDENCE—NOTICE TO PRODUCE.
- VIII. EXAMINATION OF WITNESSES ON TRIAL.
- IX. COMMISSION—INTERROGATORIES—DEPOSITIONS.
- X. ADMISSION FROM PLEADINGS.
- XI. MISCELLANEOUS.
- XII. QUESTIONS FOR JURY.
- XIII. GENERAL ISSUE—EVIDENCE UNDER.

**I.****ADMISSIONS—DECLARATIONS—ACTS.**

*See* Acknowledgment.

**1—Admissions under Great Seal of the Province—Evidence against the Crown.**

*Rex. v. Wilson. Ber. 1.*

**2—By professed owner of land—Payments.**

Where the defendant deduced his title by several *mesne* conveyances from W. K., the declaration of W. K., while the professed owner of the estate, that he never paid anything for it, are properly admissible in evidence to shew that the recorded deed to W. K. was not made, as it purports to be, for a valuable consideration. *Payson v. Good*, 3 Kerr 272.

**3—Res Gestæ—Counter Evidence.**

The declaration of a party accompanying the act of shewing the point of beginning on the boundary of a grant, are admissible in evidence as part of the *res gestæ*, but the truth and correctness of such declarations are open to be controverted by other evidence. *Doe dem Lonchester v. Murray*, 3 Kerr 385.

**4—Contradicting Deed.**

The declaration and admission of a party filling the character of surviving partner and administrator, and also of another party as heir of a person through whom the defendants claim title, were offered by the plaintiff in evidence, but rejected by the Judge on the ground that such admissions went to contradict the terms of a deed between the parties who made the admissions. *Held*, that the learned Judge was right in rejecting such evidence. *Maloney v. Purden*, 3 Kerr 515.

**5—At time of making Bargain.**

Evidence of what the parties said at the time of making a bargain for the purchase of land, is admissible to shew what they meant by certain expressions used in the conveyance. *Doe. v. Pitt*, 1 All 385.

**6—By grantee—Effect of.**

The verbal declaration of the grantee of land, that he had sold it to a person under whom the defendant claims, is not sufficient to shew title out of the grantee. *Doe. v. Todd*, 2 All. 261.

**7—Commissioner of Highway—Intention.**

The declaration of a commissioner of highways, at the time of laying out a road, that he intended to lay it out four rods wide is not admissible. *Basterach v. Atkinson*, 2 *All.* 489.

**8—Judgment Debtor—Ability to pay.**

*Quere*, Whether in an action for an escape, evidence of the admission of the judgment debtor of his ability to pay the debt, was properly rejected. *Kelly v. Jones*, 2 *All.* 465.

**9—Trove—Statement at time of demand.**

A. executed a bill of sale to the plaintiff and delivered it to the defendant, who agreed to hold it as the agent of both parties. *Held*, in trover for the bill of sale, That the defendant's declarations made at the time of a demand, stating his reasons for refusing to give up the bill of sale, were admissible in evidence. *Dover v. Myhrall*, 3 *All.* 354.

**10—Fraudulent conveyance—Declaration as to state of affairs.**

Where the issue was whether a conveyance from A. to the defendant was fraudulent, a declaration made by A. as to the state of his affairs, is not admissible in evidence, unless made at, or about the time when the deed was given. *Doe v. Fraser*, 3 *All.* 417.

A letter written by the plaintiff to A. several years after the conveyance and not referring to it in any way, is not evidence for the defendant in such a case; nor is a subsequent conveyance of land from the defendant to A. admissible evidence to rebut the charge of fraud in the conveyance from A. to the defendant. *Ibid.*

Where the declaration of a third party is offered in evidence, the circumstances relied on to make it admissible should be stated to the Judge. *Ibid.*

**11—Maker of Note—Declarations.**

In an action against one of a joint and several promissory note signed by him as a surety for the other maker,

declarations of the latter made subsequent to giving the note are not evidence against the defendant. *Palmer v. Wilbur*, 8 *All.* 448.

**12—Statement of affairs—Exhibit—Schedule.**

A debtor, for the purpose of making a settlement with one of his creditors, exhibited to him a statement of his affairs, which the creditor copied in his presence. *Quere*, Whether such copy was admissible in evidence as duplicate original or as a statement made by the debtor without notice to produce the original. A schedule referred to on a mortgage but not annexed to it, is not admissible in evidence without proof that it was signed at the same time as the mortgage. *Lawton v. Tarrat*, 4 *All.* 1.

**13—Entry in books—To whom credit given.**

In an action for money lent, where the question in dispute was whether the loan had been made on the credit of the defendants, who were Aldermen of the city of St. John, and borrowed the money for the use of the city—of which the plaintiff was aware at the time; an entry made in the plaintiff's books, debiting the Corporation with the money, is not conclusive; if not having been communicated to the defendants, and no authority from the Corporation to contract the loan having been proved. *Gilbert v. Porter*, 1 *Kerr* 390.

**14—Fraudulent transfer—Entries in books—Admissions as to state of business.**

B., who was largely indebted, and several suits pending against him, transferred all his property to the plaintiff for £7,000, and took as payment the plaintiff's promissory notes payable in five years, without security. *Held*, in an action brought by the plaintiff against a creditor of B., who had seized the property under an execution, That the value of the plaintiff's notes in the market, and his probable means of paying them, was relevant testimony to show that the transfer was fraudulent, and made to defraud B.'s creditors. *Held*, also, That entries in B.'s books, relative to the property, though made by his clerks, might be re-

ferred to by him on cross-examination, and by his clerks on examination in chief by the defendant, in order to shew the value of his property and the state of his business at the time of the transfer. *Lawton v. Tarratt*, 4 All. 1.

In order to establish fraud in the transfer, declarations and admissions by B., both before and after the transfer, as to the general state of his business and the value of the property transferred, are admissible in evidence on the part of the defendant. *Ibid.*

The reasons for objecting to such evidence where its admissibility is doubtful, are much diminished by the Act 19 Vic. c. 41, allowing the parties to testify. *Ibid.*

**15—Insurance—Verbal declarations of owner of vessel as to part ownership.**

In an action upon a policy of insurance for the loss of a vessel, the verbal declarations of the plaintiff, the sole registered owner, that another person a foreigner was part owner, are not sufficient to disprove the allegation of interest in the plaintiff, who had obtained the register upon his own declaration, and acted as owner in procuring the insurance, and in the other affairs of the vessel. *Watson v. Summers*, 2 Kerr 62.

**16—Ejectment—Examination in Bankrupt Court—Acknowledgment of title.**

Plaintiff in ejectment relied upon a declaration made by the defendant in his examination in the Bankrupt Court, that the land in dispute had belonged to C., who conveyed it to the plaintiff, with his (defendant's) consent. *Held*, Not to be such an acknowledgment of title in the plaintiff as to prevent the operation of the Statute of Limitations. *Doe v. Taylor*, 4 All. 165.

**17—Statements in bill in Equity.**

The statements in a bill in Equity, under oath are evidence against the party filing it, in an action at law. *Doe dem Palmer v. Ross*, 5 All. 846.

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**18—Consideration—Satisfaction—Admissions explainable by circumstances.**

*See* Consideration 8.

**19—Trespass—Possession—Conversation.**

The defendant in an action of trespass justified under A., and in order to show title in him, offered evidence of a conversation between A. and B.—not made upon the land, but several miles distant from it—in which A. gave B. permission to build a mill on the land in dispute. B. built the mill more than twenty years before the action, but did not further recognise A's right to the land. *Held*, That this was not sufficient evidence of A's possession, and that the justification was not proved. *White v. Smita*, 4 *All.* 385.

**20—Declaration of members of Committee—Agents.**

In an action against the Corporation of St. John for negligence in constructing a sewer, whereby plaintiff's land was overflowed, declarations of Aldermen, members of the Corporation, relative to the sewer are not evidence against the defendants; but declarations of members of a committee appointed by the Corporation to superintend the construction of the sewer, made while the work was in progress, and relative thereto, are evidence—being the declarations of an agent relative to a matter within his authority. *Riley v. The Mayor, etc., of St. John*, 6 *All.* 264.

**21—Boundaries of land—Declaration must be made while party in possession—Or against interest—Or privity shewn.**

The declaration of a person as to the boundary of land is not evidence, unless it is made while he is in possession of the land, and is against his interest, or, unless there is privity between him and the person against whom his declaration is offered. *Sartall v. Scott*, 6 *All.* 166.

**21 a—Boundaries—Declarations by person in possession.**

Declarations respecting the boundaries of land by a person in possession, and under whom the defendant claims,



are evidence against him in an action in which the boundaries of the same land are in dispute. *Niles v. Burke*, 1 *Pug.* 287.

**22**——While the Crown is the owner of land it may, by its declarations, explain or control a previous grant, and a party claiming under a grant, subsequent to such declarations may be bound thereby. *Carter v. Saunders*, 6 *All.* 147. See Crown Grant.

**23—Action against Sheriff—Taking goods on execution—Declarations of third person as to transfer.**

In an action against a Sheriff for taking goods under an execution against P., which the plaintiff claimed under a previous assignment made to him by P. in payment of a debt, declarations of P.'s son, in whose possession the plaintiff had left the goods, as to the circumstances of the transfer, are not evidence against the plaintiff; though the fact of such possession is proper for the consideration of the jury in determining the *bona fides* of the transfer. *Doak v. Johnson*, 1 *Kerr* 319.

**24—Action for Wages—Evidence—Recognition of plaintiff's right to give orders—Official character—Company.**

In an action for wages as Secretary of an incorporated Company, the plaintiff relied on the defendant's having used and paid for goods ordered by him, and having paid for work done for their benefit also by his direction. Before the goods were ordered, the defendants had notified the plaintiff that he was not the Secretary of the Company. *Held*, That the payment by the Company for the work and goods was not a recognition of the plaintiff's right to give the orders, or an acknowledgment that he was the Secretary of the Company. *Ansley v. Albert Mining Company*, 5 *All.* 391.

**25—Declarations of party having title to land—Adverse Possession.**

Declarations by a party having the documentary title to land, made after the lapse of sufficient time to give another title by possession are not admissible to cut down

the latter's title. Declarations of a party adverse to his title, are admissible against a person claiming through him, if made while the title was in the party making the declarations. *Hamilton v. Holder*, 2 *Pug.* 222.

**Boundary lines—Agreement as to—Acts.**

When a division line is in dispute between parties and they agree to establish a line and do so, and act upon it by putting up their fences, and by severally occupying the land on each side, they are bound by their agreement, whether the line is right or wrong, and cannot repudiate it, though they have not held under it for a period of twenty years, so as to gain a title by adverse possession. *Perry v. Patterson*, 2 *Pug.* 367.

**Grantor—Declarations as to boundary between date of delivery and registry of deed—Relation of registry and delivery of deed.**

T. being the owner of a lot of land, sold part of it to defendant, and the remainder to plaintiff shortly afterwards. A dispute subsequently arose between plaintiff and defendant as to the true boundary between them, and the present action was brought. On the trial defendant stated that T. pointed out what he (defendant) now claimed as the true boundary line, and he placed his house up to the line as pointed out. This was subsequent to the delivery of the deed to plaintiff and to his going into possession, but before registry. The jury were directed that plaintiff was estopped by the declarations of T., made before registry of the deed to plaintiff, and a verdict was found for defendant. At the time of the trial, T. was absent from the Province, and there was not sufficient time between the rendering of the verdict and the day when it was necessary to move for a new trial to procure T.'s affidavit; but a new trial was granted on payment of costs, on an affidavit of plaintiff stating that he was taken by surprise by defendant's evidence as to the alleged declarations of T., and of a letter attached to the affidavit from T., entirely denying that he had made any such statements. *Held*, per Wetmore J.,

That, plaintiff having entered into possession under his deed, the evidence of T.'s declarations, made after that, was improperly admitted.

*Quære*, Whether registry of a deed does not so relate back to the date of delivery as to prevent acts and declarations of the grantor after delivery, but before registry from binding the grantee. *Philps v. Trueman*, 3 *Pug.* 391.

#### **Ownership of Vessel.**

In an action for freight by a ship owner, proof that plaintiff had for several years the management of the vessel and run her, taking charge of her when she arrived in port, and paying the captain and crew, is sufficient evidence for a jury of plaintiff's ownership. *Ferguson v. Domville*, 3 *Pug.* 288.

#### **29—Captain of Vessel—Bill of Lading—Statement as to selling goods under.**

In an action brought against the charterers of a vessel for non-delivery of goods shipped under a bill of lading signed by the captain, a declaration by the latter, while in charge of the vessel, that he had sold the goods, was held properly admitted in evidence. *Burpee v. Carvill*, 3 *Pug.* 141.

#### **30—Underwriters—Declarations by—Affidavit referred to.**

In an action against the Secretary of the Society of Underwriters under the Act 21 Vic. cap. 61, the declarations of an underwriter on the policy relative to the subject matter, are evidence against the defendant; and if such declarations refer to facts stated in an affidavit obtained by the plaintiff respecting the loss, such affidavit is also admissible. *Duffy v. Stymert*, 5 *All.* 197.

#### **31—Agent—Action of tort against carrier.**

An admission by the freight agent of a company, who were common carriers, that a claim made against them by plaintiff for injury to goods carried by them, was all right, such admission being made two days after delivery, and

after the agent had examined the goods, was held to render it unnecessary for plaintiff to prove by other evidence that the goods were actually injured at the time of delivery. *Regina v. Peters*, 3 *Pug.* 77.

**32—Letter Res gestæ.**

The plaintiff put in evidence the contents of a letter sent by him to his son enclosing a money order, and containing instructions as to the disposition to be made of the money. The letter being lost.—*Held*, That its contents were properly received in evidence as explaining the act of sending the order, the letter forming a part of the Act. *Clewser v. Samuel*, 2 *Pug.* 58.

**33—Partnership—Inducing belief in—Direction of Judge as to liability.**

Plaintiff was sole contractor with the Corporation of St. John for the performance of certain work, and defendant was his surety, the consideration for which was that he was to receive a certain portion of the money. Defendant drew all the money from time to time. It appeared that one M. was entitled, as between plaintiff and the latter, to receive half the money, and did receive an equal portion of various payments made by defendant as plaintiff said by his direction, but he denied that M. was a partner with him in the contract. Defence was—1st. That plaintiff and defendant were partners in the transaction. 2. That plaintiff and M. were partners. The learned Judge directed the jury that if they found for the defendant on either of these points, plaintiff could not recover; also that if plaintiff by his statement or acts induced defendant to believe there was a partnership between him (plaintiff) and M. by reason of which defendant treated the business as if plaintiff and M. were in partnership, and thereby altered his position or was prejudiced in any way, plaintiff would be as much bound by it as if a partnership actually existed. *Held*, A proper direction. *Smith v. Geroux*, 2 *Pug.* 425.

**34—Conversation conveying information.**

O. and his partner, being desirous of fitting out a ves-

sel which they were building, applied to R. to furnish the materials for the sails, which he agreed to do, provided defendant, who was to make the sails, agreed to retain them until he (R) was paid. O.'s firm afterwards became insolvent, and plaintiff was appointed their assignee by the creditors. After his appointment, plaintiff went to defendant for the sails, when the latter told him that if plaintiff paid his bill he could have the sails, nothing being said of R.'s lien. Plaintiff paid defendant's bill, but when he went for the sails, defendant refused to let him have them, stating that R. had a claim upon them. Plaintiff then replevied the sails, and R. put in a claim of property and became defendant in the suit, and finally succeeded in the action; whereupon plaintiff brought the present action for defendant's breach of contract to deliver the sails, and, under the Judge's direction, recovered a verdict for the amount paid, with interest, and also his costs in the action of replevin. On the trial evidence was offered to show that before plaintiff was appointed assignee he had been informed by R. of his lien but the evidence was rejected. The court ordered a new trial, holding that this evidence was improperly rejected. *Deveber, Assignee, &c., v. Roop*, 3 *Pug.* 295.

### **35—General conversations—Indictment for riot.**

On the trial of an indictment for riot, evidence of general conversations between a witness and the person at whose house the prisoners were alleged to have committed the riot, were not allowed to be given. *Regina v. Marloux, et al.*, 3 *Pug.* 493. (See Criminal Law.)

### **36—Conduct of prisoners previous to riot.**

On the trial of an indictment for riot and unlawful assembly on the 15th January, evidence was given on the part of the prosecution of the conduct of the prisoners on the day previous, for the purpose of shewing, as was alleged, that B., in whose office one act of riot was committed, had reason to be alarmed when the persons came to his office. The prisoner's counsel thereupon claimed the

right to shew that they had met on the 14th to attend a school meeting, and claimed the right to give evidence of what took place at the school meeting, but the evidence was rejected, and *Held*, (per Allen, C. J., and Fisher and Duff, J. J., Weldon and Wetmore, J. J., *diss.*) That the evidence was properly rejected, because the conduct of the prisoners on the 14th could not qualify or explain their conduct on the following day. *Ibid.*

**37—Prisoner's declaration before charged with crime.**

A declaration made by a prisoner tried on an indictment for larceny, before he was charged with the crime, in answer to a question asked him where he got the property, is evidence on his behalf. *Regina v. Ferguson*, 3 *Pug.* 612. (See Criminal Law.)

**38—Prisoner's statement before Magistrate.**

A statement of prisoner before the magistrate is admissible when there is no evidence of promise or threat, although the provisions Statute 32 and 33 *Vic. cap.* 22, sec. 3, cap. 29, sec. 27, and cap. 30, sec. 32, may not have been strictly complied with. *Regina v. Souci*, 1 *P. & B.* 611. (See Criminal Law.)

**39—Executor, de son tort—Meddling with goods—Declarations of deceased.**

Any dealing with the goods of a deceased person, by which the party so dealing assumes to exercise a control over the goods, is evidence against him as executor *de son tort*.

In action charging a person as executor *de son tort* by meddling with the goods of the deceased, a declaration of the deceased, while in possession that the goods did not belong to him, is evidence for the defendant. *Powell v. Watkin*, 5 *All.* 258.

**40—Election law—Agent's admission.**

A conversation with a witness, or the admission of an agent, had and made on the day of the election, immediately after the close of the polls, is admissible in evidence *Duff v. Ryan*, 3 *Pug.* 110. (See Election Law.)

**41—Insolvent—Statements by, on examination before Assignee.**

Statements of an insolvent on his examination before Assignee at creditors' meeting, are evidence against him on a criminal trial. *Regina v. McLean*, 1 P. & B. 317. (See Criminal Law.)

**Absconding debtor—Ownership of property—Sufficiency of admission.**

See Absconding Debtor 17. *Cullen v. Voss*.

**42—Conversations between person through whom defendant claimed title to lot, and the person who owned house in which windows were opened, relative to their opening, which conversation was had after the person through whom defendant claimed had parted with his title in the lot in question, are not admissible.**

See Evidence VI. 15. *King v. Pugsley*.

**43—Declarations not within scope of duties.**

In an action against a Corporation, the declarations of the Mayor and Auditor respecting matters not within the scope of their duties, are not evidence for the plaintiff. *Gervais v. Mayor, &c., St. John*. 6 All. 411.

**Fieri Facias—Delivery—Intention to have executed—Letter to debtor.**

See Execution I. 5.

**Account rendered.**

See Assumpsit III. 3.

**Bills and Notes—Admissions.**

See Bills and notes IV. 9.

**To party stranger to suit—Matter not affecting suit.**

See Estoppel I. 14.

**Receipt of purchase money in deed.**

See Estoppel I. 17.

**Counsel addressing jury.**

*See* Attorney X. 15. Estoppel I. 23.

**Estoppel opened by bond.**

*See* Estoppel III.

**Admission of party that bond was his—Not conclusive.**

*See* Estoppel I. 25.

**Libel—Justification from admission.**

*See* Defamation 9.

**Subsequent act not affecting previous admission.**

*See* Assumpsit III. 21.

**Offer to confess judgment.**

*See* Judgment II. 4.

**Payment of money into Court.**

*See* Infra X. 9, 10, 11.

**Implied contract of overseers of poor.**

*See* Contract 38. *Regina v. Archibald.*

## II.

## JUDICIAL, OFFICIAL, AND OTHER DOCUMENTS.

**1—Plan—Grant.**

A plan produced by the heir of one of the grantees of the Crown, which had been in his possession for twenty-five years, and which had been seen in his father's possession for fifteen years before that, and which was kept with the grant, was held to be sufficiently authenticated as the plan referred to in the grant as "annexed," though the witness had never seen it annexed to the grant. *Kex v. Wilson*, *Ber.* 1.

**2—Subsequent grants—Reference—Effect.**

Where land in dispute was contained in a grant from the Crown to the defendant in 1827, but was claimed by the plaintiff as part of a grant made in 1784, to one D., under whom he made title, if there is any uncertainty as



to the rear line of the grant to D., subsequent grants to the Crown to other persons, prior to the defendant's grant, in which the D. grant is referred to, are evidence for the purpose of ascertaining where the Crown considered the rear line of the D. grant to be; but not to vary the description, nor alter its construction. *Doe dem. Carter v. Jones*, 3 Kerr 155.

**3**——Where the lessor of the plaintiff claimed land in question as being part of lot No. 33, granted to the Crown in 1784, and the defendant claimed it as being in rear of No. 33, granted in 1839; other grants of the Crown of adjoining lands, made in 1786, and between that date and 1839, may be referred to for the purpose of ascertaining what the Crown considered to be the true rear line of lot No. 33; provided there is any uncertainty as to the line. *Doe dem. Ponsford v. Vernon*, 2 Kerr 351.

**4**——Where land granted to the defendant in 1839 was described as being in rear of lot No. 33 (granted to the Crown in 1784,) and lying between that lot and lot No. 39; subsequent grants of adjoining lands in 1786 and 1787, in which lot No. 33 was described as extending to, and bounding lot No. 39, are evidence to shew the Crown out of possession, for more than 20 years, of the land described in the defendant's grant so as to prevent that grant from operating without a previous inquest of office. *Ibid.*

**5**——Where the question in dispute is the division of the line between two tracts of land granted by the Crown, and a grant issued subsequent to both these grants, is no evidence for the purpose of explaining any ambiguity in either of them, and ascertaining where the Crown intended the line to be; while the Crown is the owner of the land, it may by its declarations explain or control a previous grant, and a party claiming under a grant, subsequent to such declarations, may be bound thereby. *Carter v. Jones*, 3 Kerr 155.

**6—Surveyor's return—Ambiguity in grant.**

A return of a survey of land filed in the Surveyor General's office, upon which a grant issues, is admissible

evidence to explain an ambiguity in the grant, though the handwriting of the Surveyor who made the return is not proved—it being an official document coming from the proper custody, and the Surveyor being dead. *Wiggins v. McLean*, 1 All 671.

**7**———A return of a survey in Crown land filed in the Surveyor General's office, is not evidence to prove that the Surveyor has run the lines stated in the return, although it is an ancient document, and the Surveyor is dead. *Maynes v. Dolan*, 3 All. 573.

**8—Decree of partition.**

A decree of partition is evidence in an action of ejectment, to show that the land in dispute, formerly part of an undivided estate, had been assigned as the separate property of the plaintiff. *Doe v. Estey*, 3 All. 489.

**9—Deed—Pleading—Assent of grantee.**

To an action for the breach of a written contract whereby B., in consideration of £500 paid to him by A., agreed to convey to A. a mill and mill privilege at P., as soon as he obtained a grant thereof. B. pleaded 1st. *non assumpsit*; 2nd. That he executed and delivered a conveyance to A.; and 3rd. That a conveyance was tendered and refused. At the trial a registered deed was offered in evidence under the pleas, but without proof by the subscribing witness of the execution in the ordinary way. *Held*, That such evidence was properly rejected, it not being competent for the grantor to make a deed evidence by mere force of the registry and acknowledgment, without delivery to or the assent of the grantee. *Smith v. Millidge*, 2 Kerr 408.

**10—Proof of Deed, before received in evidence.**

A deed appeared to have been executed in the presence of two witnesses, one of whom, a Justice of the Peace authorized to take acknowledgment of deeds, was dead: no account could be given of the other by persons who had the best means of obtaining a knowledge of the inhabitants of the place where the deed was executed. *Held*, That it was properly received in evidence on proof of the handwriting of the deceased witness. *Doe v. Hatheway*, 2 All. 69.

**11**———The execution of a deed of conveyance is not proved by the Magistrate's certificate of acknowledgment endorsed thereon, without registry. *Joplin v. Johnston*, 2 *Kerr* 541.

**12—Registry of deed before proof.**

A deed offered as a registered conveyance, appeared by the certificate endorsed, to have been registered before it was proved. *Held*, That it could not operate as a sufficient registry by relation, and that the deed was improperly admitted in evidence. *Doe v. Rideout*, 3 *All.* 502.

**13—Registry Book—Two deeds written on one sheet—One Certificate.**

Where two deeds were written on the same sheet of paper and registered at the same time, but only one certificate of registry and one number were endorsed—*Held*, That the Registry Book was properly admitted in evidence to shew that both deeds were registered. *Doe. v. McCulley*, 3 *All.* 194.

*Quære*, Whether a proper certificate of registry could not have been endorsed at the trial. *Ibid.*

**14—Probate of Will.**

The probate of a will, though registered, is not evidence of a due execution to pass real estate. *Hamilton v. Love*, 2 *Kerr* 243.

**15—Judgment of Foreign Court**

Is evidence only of debt. *See Fergus v. Wardlaw*, 3 *Kerr* 665.

**16—Seal of Foreign Judgment.**

It is sufficient that the seal affixed to a foreign judgment is the seal used by the foreign Court, though it purports on its face to be the seal of a different Court from that in which the judgment was obtained. *See Cyr v. Sanfacon*, 2 *All.* 641.

**17—Foreign Judgment—Proof of.**

A judgment of the Court of King's Bench in England may be proved in this Province by an examined copy veri-

fied by an affidavit sworn before the Lord Mayor of London, under the Act of Parliament 5 Geo. II, cap. 7 ; such affidavit by the Act being tantamount to the *viva voce* testimony of the witness. *Champion v. Long, Hil. T. 1834.*

**18—Record of Judgment—Debt on Bond—Date.**

*Semble*, That the record of a judgment in an action on a bond, is evidence of the date of the bond, in an action of ejectment by a person claiming the title under the obligor, to shew that he was indebted at the time of the conveyance, and that it is therefore fraudulent. *Doe v. Gilbert, 1 All. 520.*

**19—Writ—Execution.**

An altered *fi. fa.* is not receivable in evidence. *See Johnson v. Winslow, Ber. 53.*

**20—Original *fi. fa.* not returned.**

In making title to land under a Sheriff's deed, the original execution under which the land was sold when not returned and filed in Court, is admissible in evidence. *Linnton v. Wilson, 1 Kerr 223.*

**21**———In an action against a Sheriff to recover money levied by him under an execution, the original execution with the Sheriff's return thereon in the hands of the attorney is not evidence ; after being returned the execution is a record, and the evidence should come from the proper custody. *See Supra 20. Stuart v. Andrews, Hil. T. 1827.*

**22—Contemporaneous Letter**

Where part of the alleged consideration for an assignment of goods was interest money due on a bond to a creditor in Nova Scotia, and a bill of exchange drawn by him on the plaintiffs was given in evidence. *Held*, That a contemporaneous letter written by the creditor, which specified that the bill was drawn for such interest, was admissible in evidence. *Kinnear v. White, 2 Kerr 235.*

**23—Agreement for consent rule—Judgment in ejectment.**

In trespass for *mesne* profits against one who came into

possession under the tenant in the action of ejectment, the agreement for the consent rule, signed by the Attorney of the tenant in possession, and the judgment in ejectment against the casual ejector are evidence for the plaintiff—the first as a proceeding to connect the tenant, under whom the defendant in this action claimed, with the action of ejectment, and the latter, to show the plaintiff's right to the possession of the property. *Fraser v. Harding*, 3 Kerr 94.

#### **24—Agreement.**

In an action for obstructing a water course an agreement between the plaintiff and defendant, whereby the latter agreed to enlarge the water course, and did so, and was paid by the plaintiff for it, is evidence for the plaintiff, and relevant to the matter in dispute. *Palmer v. Turner*, 5 All. 290.

#### **25—Newspaper—Report not authorized.**

In an action against the Corporation of St. John for negligence in the construction of a sewer, whereby the plaintiff's land was overflowed, a newspaper, purporting to contain a report of the proceedings of a meeting of the Corporation at which the question of the sewer, and its effect on the plaintiff's property were discussed, was put in evidence by the plaintiff. *Held*, That in the absence of evidence that the report was authorized by the defendant to be published, it was not evidence; and that as the statements in it had a material bearing on the plaintiff's case, and did probably influence the jury, a verdict for the plaintiff was set aside. *Riley v. The Mayor, etc., of St. John*, 6 All. 78.

#### **Newspaper—Notice—Authority.**

*See Joint Stock Company* 3.

#### **26—Nisi Prius Record—Merger of Defendant's claim.**

A judgment recovered by the defendant against the plaintiff after the commencement of the plaintiff's suit, cannot be pleaded as a set-off, even though the verdict on which the judgment is founded was given before the com-

mencement of such suit. The defendant's original cause of action being merged in the judgment, the *nisi prius* record in the defendant's suit is not evidence of the plaintiff's indebtedness before the commencement of his suit. *Hammond v. Mori*, 3 All. 426.

**27—Assignment of Mortgage by executor.**

An assignment of a mortgage by an executor is not admissible in evidence without proof of the Probate. *Doe. v. Hanson*, 3 All. 428.

**28—Receipt.**

A written receipt, signed by the mortgagee, is not admissible in evidence to prove payment of rent to him. *Joplin v. Johnston*, 2 Kerr 541.

**29—Judgment of Non Pros.—Nova Scotia.**

In an action on a Nova Scotia judgment signed, 7th March, 1855, in pursuance of a Judge's order setting aside the defendant's plea as frivolous, the defendant produced a certificate from the Prothonotary of the Court, entitled in the same cause, stating that judgment of *non pros.* for want of a replication was marked on the 11th December, 1854. *Held*, That in the absence of any record of such judgment, or of any evidence to show that "marking" was equivalent to "signing," there was not sufficient evidence of a judgment of *non pros.* to affect the validity of the plaintiff's judgment. *Dennison v. Taylor*, 3 All. 313.

*Quære*, Whether, in such case, further evidence than the mere identity of name was not necessary, to identify the defendant with the defendant in the judgment sued on. *Ibid.*

**30—Minutes of Court of Session.**

The minutes of the Court of General Sessions are evidence in the same Court of the facts therein stated, without any other proof that the matter therein recorded took place; therefore a recognizance in a case of bastardy taken under the Act 2 Vic. cap. 42, is proved by the production of the minutes of the Sessions containing the entry. *Ex parte Daley*, 1 All. 424.

**31—Proceedings before Justice of Peace returned to Supreme Court.**

An information and other proceedings before a Justice of the Peace, returned to the Supreme Court with a *certiorari* and filed with the Clerk of the Crown, becomes a record, and may be proved by an examined copy, taken before the original was filed. *Sewell v. Olive*, 4 All. 394.

**32**———A copy of the Minutes of the Supreme Court, stating the reversal of the judgment of a Justice of the Peace on *certiorari*, is not evidence of such reversal, it being of itself a judgment which should be made up of record and proved accordingly. *Douglas v. Hinkley*, Hil. T. 1828. (See *Sewell v. Olive*, Supra 31.)

**33—Memorial—Incumbrance.**

A registered memorial of a judgment against the vendor is evidence of an incumbrance on his land. *Scott v. Garnett*, 2 All. 624.

**34—Copies of proceedings in Foreign Courts—Certificate—Separate documents—Affidavit.**

Where it is sought to put in evidence copies of the proceedings of a foreign court under the Act 19 Vic., cap. 41, sec. 5, (con. stat., cap. 46, sec. 12), one certificate is sufficient, and each document need not be separately certified.

The statement in the certificate that there are no other papers on file in the cause, will not invalidate the certificate, if good in other respects.

Where on the trial of an indictment for bigamy, the defendant relied on a decree of divorce obtained in a foreign country, a certified copy of an affidavit purporting to have been made by the defendant in the cause in which the divorce was granted, is evidence against him, without proof by *viva voce* evidence that he had sworn to the original, or had used it in a cause in which he was a party. *Regina v. Wright*, 1 P. & B. 363.

**35—Bill of Sale—Certified Copy.**

A certified copy of a bill of sale is not admissible in evidence under 21 Vic., cap. 3, sec. 7. (See consol. stat.,

cap. 46, sec. 7), without proof of the execution of the original. *Lovejoy v. McDiarmid*, 1 P. & B. 275.

### **36—Nisi Prius Record—Verdict.**

In an action brought against defendant as owner of a ship, for damages for the alleged detention of a quantity of iron, the *nisi prius* record in a previous action brought by the now defendant against the now plaintiff, wherein the former sought to recover freight from the latter for carrying the iron in question, was held admissible to prove that in that suit the now defendant claimed to be owner of the ship as being an admission by him that the master of the vessel was his servant, thereby connecting him with, and making him liable for the act of the master; but evidence of the amount of the verdict recovered in that action, when no judgment had been obtained, was held inadmissible. *Domville v. Ferguson*, 1 P. & B. 41.

### **37—Notice of defence**

A notice of defence given under the Act 13 Vic., cap. 32, is not part of the *nisi prius* record, which may therefore be put in evidence without proving the notice, or accounting for its absence. *Lawton v. Adams*, 5 All. 274.

### **38—Certificate of payment—Statutory title.**

The 1 Rev. Stat., cap. 90, sec. 1, declares that when the Governor shall have paid to the Mayor, &c., of St. John, and the trustees of said corporation, and a certificate of such payment shall have been executed under the seal of the corporation, and the hand of the chairman of such trustees acknowledged or proved, and registered as in the case of deeds, a certain tract of land (described), shall be vested in the Queen for the purposes of that chapter. This section is substantially a copy of the preamble and first section of the 12 Vic., cap. 28, which declares that on registry of the prescribed certificate the land described in the Act shall be vested in the Queen without any further act or deed or conveyance whatsoever.

In an action for intrusion upon a part of the property described in the Act, the Attorney-General relied on a



registered certificate of payment under the seal of the corporation, and signed by the chairman of the trustees as evidence of the title having vested in the Crown. The plaintiff had a verdict and *Held*, On motion for a new trial, that it was unnecessary to prove the payment of the £2,000 otherwise than by the certificate, which must at all events be taken as *prima facie* evidence of the payment, if it is such a certificate as the Act requires. *Regina v. Sullivan*, 3 *Pug.* 464.

### 39—Public documents—Removal.

The contents of public documents which it is not desirable to remove from their place of deposit, such as those having reference to shipping, navigation or trade, may be proved by examined copies. *Burpee v. Carvill*, 3 *Pug.* 141.

### 40—Foreign judgment—Impeaching same.

A foreign judgment, whether in *personam*, or in *rem*, may be impeached in our courts by extrinsic evidence shewing that the Court which pronounced it had no jurisdiction, or that it was obtained by fraud. Therefore, a decree of divorce obtained in a foreign Court on a false affidavit that the party seeking it was, at the time of the suit, and had been for a year preceding, a resident of such foreign country, when in fact he was during that time a resident of this Province, is void. *Regina v. Wright*, 1 *P. & B.* 363.

### 41—Agreement to purchase—Ejectment.

Where the defendants in an action of ejectment went into possession under an agreement to purchase from the person through whom the lessor of the plaintiff claimed title, it was held that the agreement was properly received in evidence. *Doe dem. Moffat v. Thompson et al.*, 1 *P. & B.* 516.

### 42—Son assault demesne — Replication — Evidence under.

In an action of assault and battery to which the defendant pleads the plea given by the Common Law Procedure Act (Consol. Stat. cap. 37, schedule B. No. 41) "That the

plaintiff first assaulted the defendant, who thereupon necessarily committed the alleged assault in his own defence," the plaintiff may, under the general form of replication joining issue on the plea, (Consol. Stat. cap. 37, sec. 75) and without replying excess, shew that although he committed the first assault, the defendant was guilty of excess. *Savage v. Stack*, 1 P. & B. 604.

**43—Sheriff—Action against—Paper written by defendant whilst under arrest.**

A paper written by a defendant under arrest, in the presence of the Deputy Sheriff who made the arrest, the contents of which the Deputy may be presumed to have known, and by the Deputy forwarded to the prisoner's attorney, was held (per Fisher and Wetmore, J. J., Duff, J., *diss.*) to have been properly received in evidence in an action against the defendant, Sheriff. *Jones v. Botsford*, 1 P. & B. 62.

**44—Witness to deed.**

The case of *Whyman v. Garth*, (8 Exch. 803) having been decided before the Common Law Procedure Act 1854, sec. 26, from which the Act of Assembly 19 Vic. cap. 41, sec. 18 (Consol. Stat. cap. 46, sec. 23) is copied, deciding that the subscribing witness to a deed must be called, is not applicable to the case of a deed executed since the passing of that Act. *Doe dem. Fairweather v. Nevers*, 3 Pug. 614.

**Highway—Return of plan—Evidence of laying out.**

*See Highway 33. Regina v. McGowan.*

III.

PARTICULAR ACTIONS AND SUITS.

**1—Promissory Note—Evidence under Common Counts.**

*See Bills and notes VI. 12.*

Assumpsit III. a.

**2—Defamation—Affidavit of defendant before magistrate—Malice.**

In an action for oral slander an affidavit made by the

defendant before a magistrate as the foundation of a criminal proceeding against the plaintiff, which is still pending, is not admissible evidence to shew malice in the defendant. *Rankine v. Clarke*, Ber. 303.

**3—Charge of Stealing—Evidence of general bad character of plaintiff not admissible in mitigation of damages.**

*Williston v. Smith*, 3 Kerr 443.

**4—Allegations—Affidavits—Innuendoes.**

In an action of slander for charging the plaintiff with perjury, some of the counts stated in the inducement that the words were spoken of and concerning the plaintiff and of and concerning a certain affidavit, etc., the defendant justified, setting out the affidavit, and alleging certain statements therein contained to be wilfully false. The affidavit referred to two papers which were annexed, but there was no positive proof that they were annexed when the affidavit was sworn to by the plaintiff. *Held*, That there was sufficient *prima facie* evidence to let in the whole of the affidavit, and that the admission of part to be read without the papers annexed was not correct, and the innuendoes not sufficiently proved. *Milner v. Gilbert*, 3 Kerr 617.

**5—Mesne profits—Judgment—Agreement for consent rule.**

In trespass for *mesne* profits by A. against C., who claimed under B. for an alleged wrong by C. between the time of the demise to A. and his recovery against B., a judgment in ejectment by A. against the casual ejector (B. being the real defendant, and by C. his attorney, having entered into the usual agreement for a consent rule) was offered, together with the agreement for a consent rule, and admitted in evidence; and it appeared that after such judgment obtained, the plaintiff's agent had taken possession of the premises, though no *habere facias* had been executed. *Held*, That such judgment was rightfully received in evidence against C., he having come in under B. *Held* also, That the agreement for the consent rule was

admissible as a proceeding in the action of ejectment, which served to connect B. with the ejectment suit, as tenant in possession. *Fraser v. Harding*, 8 Kerr 94.

#### **6—Inspection of Pickled Fish.**

*Quæst.*, Whether any evidence is admissible of the bad quality of pickled fish inspected and marked under the Act of Assembly 5 Wm. IV, cap. 43, other than the re-inspection provided for in the thirteenth section of that Act; or without such re-inspection having been made? *Smith v. Dunham*, 2 Kerr 630.

#### **7—Sheriff—Action against for false return—Malice—Past Practice.**

In an action against the Sheriff of A. for a false return to a writ of election, where the charge was, the unlawfully striking out the names of voters who had refused to take the oath of qualification after having polled, evidence of such a practice at elections in the county of W., of which A. was formerly a part, is admissible on the question of malice. (Per Ritchie, J., Parker, J., *dubitant.*) *Stiles v. Gilbert*, 4 All. 421.

#### **8—Limit bond—Defence—Discharge of debtor—Fraud.**

Where the defence to an action against the sureties on a limit bond is, that the debtor was discharged by the Justices for non-payment of the weekly allowance, evidence is not admissible to show that the discharge was fraudulently obtained, by the debtor concealing himself to avoid the payment, unless the sureties are implicated in the fraud. *Jones v. Fletcher*, 4 All. 550.

#### **9—Partners—Proof.**

In an action by partners, brought after the Act allowing parties in a cause to be witnesses, it is not necessary to call the plaintiffs to prove the partnership—it may be proved by other evidence—in the usual way by parties having dealings with them as such, or by persons having means of knowing who composed the firm. *Rankin v. Hariey*, 1 Han. 271.

**10—Negligence as surgeon—Differing statements made to different persons.**

In an action against the defendant for negligence as a surgeon, in his treatment of the plaintiff, whose hands and feet had been amputated in consequence of his having been frozen, it was proved by the plaintiff that when the defendant first visited him, he said that the plaintiff would not lose any of his limbs. *Held*, That a statement made by the defendant on the same occasion, to another person in the house where the plaintiff was, that he would lose his hands and feet, was evidence for the defendant as part of the *res gestæ*, it appearing that his practice was always to encourage his patients, and prevent a depression of their spirits. *Key v. Thomson*, 1 *Han.* 297.

When the plaintiff gives the evidence of medical men as to the proper treatment of cases of frozen limbs, the necessity of frequent visits, and their practice in particular cases; the defendant may give evidence of the treatment of other cases of a similar character, and of the results, in order to rebut the inference of negligence arising from the evidence on the part of the plaintiff. *Ibid.*

**11———**Disproof of wrongful intent in action for negligence against a surgeon not admissible. *See Kelly v. Dow*, 4 *All.* 435.

**12—Assumpsit not accepting timber—Contract with other parties—Irrelevant testimony made relevant.**

In an action for not accepting timber according to agreement, the plaintiff gave evidence of the purchase of timber by the defendant from C. and W. about the same time. *Held*, That although the defendant's contract with C. and W. would otherwise have been irrelevant testimony, the plaintiff had thereby made it material, and that it was open to the defendant to go into evidence to explain the whole of the transaction with C. and W., without calling them as witnesses. *Connell v. Smith*, 3 *Kerr* 483.

**13—Trover—Custom.**

By regulations of Government, no timber was to be cut

on ground applied for until the license had issued. *Quære*, Evidence of a practice to the contrary is admissible. *Coombes v. Hatheway*, 3 Kerr 592.

**14—Negligence of plaintiff—Reduction of Contract Price.**

In an action for work and labour in unloading a ship, the defendant cannot give evidence in reduction of the contract price, of the value of certain property in the ship belonging to a third party, which was destroyed by the plaintiff's negligence in discharging the cargo, in consequence of which the defendant would be liable in damages to the owner of such property. *Wilson v. Jarvis*, 3 Kerr 671.

**15—Special Contract—Relation to part only of work.**

In *indebitatus assumpsit* for building a house, the plaintiff proved the value of the work to be £140, in answer to which it was shown that the principal part of the work was done under a special contract for £55. *Held*, That evidence of a special contract which related to part of the work only, was inadmissible in reply. *Robertson v. Miles*, 1 All. 27.

**16—Entry in books—Bond—Principal and Surety.**

In a joint action a principal and surety on a bond conditioned for the fidelity of the principal as a clerk, entries of the receipt of sums of money made by the clerk in books kept by him in the course of his duty, are evidence against the surety of the receipt of the money; but *Semble*, That an entry by the clerk in the margin of the check book of the drawing of a check, without showing that it has been paid, is not evidence against the surety. *Mechanics' Whale Fishing Company v. Kirby*, 1 All. 228.

By the condition of the bond the obligors agreed to make good to the plaintiffs, a Corporation, any loss sustained by the misconduct of K. as a clerk, within three months after due proof thereof either by confession of K. or otherwise, and notice or warning thereof in writing given to the obligors. *Held*, That a notice from the Solicitor of

the Company to the obligors of the general nature of K's. default, accompanied by an account of entries made by him in the Company's books, shewing the moneys received and paid, and a notification that the books were open for the inspection of the obligors, was sufficient proof, and that an affidavit verifying the account was unnecessary. *Held* also, That neither the notice nor the Solicitor's appointment need be under the seal of the Company. *Mechanics' Whale Fishing Company v. Kirby*, 1 A". 228.

**17—Former recovery—Admissible in replevin.**

A former recovery in replevin is admissible in evidence in a subsequent action between the same parties without being pleaded, where the matter in dispute is in substance the same, and relates to the title of the land from which the trees were cut and carried away. *Stewart v. McFarlane*, 1 All. 238. See Former Recovery.

**18—Bankruptcy—Certificate—Fraud.**

Evidence that the bankruptcy was fraudulent and collusive, is inadmissible on a trial at *Nisi Prius* to impeach a bankrupt's certificate duly obtained from the Commissioner, and certified by the Court of Chancery under the Acts 5 Vic. cap. 43, and 6 Vic. cap. 4. *Morrison v. Albee*, 2 All. 145.

**19—Trespass—Laying out road—Justification—Plaintiff's original case—Rebutting evidence.**

The defendants in trespass justified entering, under the Act 13 Vic. cap. 4, as Commissioners of highways to lay out a road through the land, and proved a return of the road sufficient upon its face. *Held*, That evidence of excess in laying out the road wider than the law allowed, must be given as part of the plaintiff's original case, and was not admissible as rebutting evidence. *Downing v. Gault*, 2 All. 569.

*Quære*, Whether evidence of a person not present at the laying out, but who afterwards examined marks on the trees where the road was laid out, is admissible to prove excess? *Ibid*.

**20—Special damage—Contract.**

Evidence of special damage in not being able to fulfil a contract for the delivery of logs, is not admissible where the damage alleged in the declaration is that the plaintiff was prevented from getting the logs to market, and thereby lost the freight and sale thereof. *Rowe v. Titus*, 1 All. 326.

**21—Record of judgment—Date of bond.**

*Semble*, That the record of a judgment in an action on bond, is evidence of the date of the bond in an action of ejectment by a person claiming title under the obligor, to shew that he was indebted at the time of the conveyance, and that it is therefore fraudulent. *Doe v. Gilbert*, 1 All. 520.

**22—Entry on books—Delivery of timber.**

Where both the plaintiff and defendant claimed to have had a delivery of timber from M., the original owner, an entry by the plaintiff in his books, of a credit to M. of the amount of the timber, dated at the time of the alleged delivery, but not actually made till a year after, and without the knowledge of M., is not evidence for the plaintiff. *McMillan v. Fraser*, 2 All. 615.

**23—Penalty—Prosecution for—Selling liquor without license.**

In a prosecution for a penalty for selling liquor without license, proof that the sale was made by a person in the defendant's shop in his absence, and without shewing any general or special employment of such person by the defendant in the sale of liquors, is sufficient *prima facie* evidence against him. *Ex parte Parks*, 3 All. 287.

The prosecutor need not prove that the defendant had no license. *Ibid*.

**24—Action of administrator.**

In an action against an administrator to which he pleads an outstanding judgment, and *plene administravit præter*, and the plaintiff proves assets in the denfendant's hands, more than sufficient to satisfy the judgment, the defendant



will not be allowed to give evidence of the payment of debts before the recovery of the judgment and before the receipt of the assets. *Backhouse v. Palmer*, *Hil. T.* 1828.

**25—Action against Sheriff—Proof of judgment to warrant execution.**

In an action against a Sheriff, where he justifies under an execution against a third person, he must give in evidence the judgment on which the execution was founded. *Crane v. Clarke*, *Hil. T.* 1828.

**26—Trespass—Title in foreign country.**

In an action of trespass *de bonis asportatis*, evidence of title to land in a foreign country is admissible to prove the plaintiff's right to the property taken. *Mann v. Chamberlain*, *Hil. T.* 1828.

**27—Action on Guarantee—Joint or several interests.**

Defendants gave a guarantee that the wages due W. K. and G. N. from J. H. for making timber, should be paid when they brought the timber up. *Held*, in an action on the guarantee by G. N., That evidence was admissible to shew that he and W. K. were separately employed by J. H., and had separate wages, in order to shew that their interests under the guarantee were several. *Neville v. Joseph*, *Hil. T.* 1832.

**28—Action on the case—Special damage—Other evidence than damage stated.**

The object of stating special damage in a declaration is that the defendant may be enabled to meet the charge if it is false ; and therefore where the law does not necessarily imply that the plaintiff has sustained damages by the act complained of, it is essential to the validity of the declaration that the damage should be stated with particularity and accuracy. Therefore where in an action on the case, the declaration stated that leaves from trees on defendant's premises which had been allowed to grow and overhang plaintiff's house, filled up and obstructed the spouts for conveying water from the roof of the house, by means

whereof plaintiff had been put to expense in clearing the leaves from the spouts, and the spouts had been greatly injured thereby. *Held*, That under this statement of damage, evidence of the rain-water being discolored by the leaves and rendered unfit for use, was improperly admitted. *Mullis v. Rose*, 3 *Pug.* 384.

### **29—Breach of promise of marriage.**

On the trial of an action for breach of promise of marriage, where plaintiff gave evidence of her seduction by defendant, the latter by his cross examination of plaintiff, attempted to shew her unchastity before her acquaintance with him. *Held*, That this gave her the right to repel the imputation involved in such cross examination, not only by her own evidence, but also to vindicate her character by other testimony. *Held* also, in such action, that the defendant could not give evidence of the reputation of the plaintiff's mother, though he might shew the character of the house in which plaintiff lived. *Burke v. Scribner*, 3 *Pug.* 652.

### **30—Scientor—Biting by dog.**

In an action to recover damages sustained by plaintiff from a bite from defendant's dog, plaintiff will not be allowed to prove that subsequent to the injury complained of the dog had bitten another person.

In this case, which was tried in a County Court, such evidence was admitted of the biting of one C., but in charging the jury the Judge told them that the fact that the dog bit C. was no evidence, and did not shew that defendant knew of the mischievous character of the dog on the day plaintiff was bitten; the Judge refused a new trial, and the defendant having appealed, it was held by Weldon, Fisher and Wetmore, J. J., that, though the evidence was improperly admitted, there being evidence that defendant knew, before plaintiff was bitten, of the mischievous disposition of the dog, and the objectionable evidence having been withdrawn from the jury, the verdict should not be disturbed, but by Allen, C. J., and Duff, J., that the evid-

ence was inadmissible, and as it was impossible to say that it had no effects on the minds of the jury, or that without such evidence they would have found for plaintiff; that, therefore, there ought to be a new trial.

It is necessary in an action for injury inflicted by a dog, to allege and prove that defendant had knowledge of the animal's vicious propensity. But as soon as that knowledge is shewn, the same responsibility attaches to his owner, to keep him from doing mischief, as the keeper of an animal naturally ferocious would be subject to; and there is no necessity for proving negligence.

Where defendant's dog was left in a yard to watch the premises, and in charge of his family, during which time V. was bitten by the dog, in presence of defendant's family. In an action brought for subsequent biting of plaintiff by same dog, the biting of V. was proved, and also the fact that V. had told the defendant of it. Defendant offered to prove the account his family had given him of the way in which the dog came to bite V., but the evidence was rejected. *Held*, That the evidence was properly rejected. *Wilmut v. Vanwart*, 1 P. & B. 456.

### **31—Judgment and execution—Trover.**

Judgment and execution properly admitted under pleas of not guilty, and that property was not the property of plaintiff in action of trover against Sheriff and judgment creditor. *See Trover 31. Harris v. Vail et al.*

### **32—Competency of defendant as witness—By-Law St. John—Penalty—Civil proceeding.**

Proceeding for the recovery of penalty when in nature of civil suit and not a criminal proceeding, evidence of defendant admissible. *See By-Law 8. Ex parte Trask.*

### **33—Criminal Proceeding.**

Prosecution for recovery of fine for knowingly solemnizing marriage where either party is under twenty-one years of age, without consent of the father, under Rev. Stat. cap. 146, sec. 3, is a criminal proceeding, and defendant is not a competent witness under Act 19 Vic. cap. 41, (Consol. Stat. cap. 46). *Regina v. Gallant*, 5 All. 115.

**34—Deceased person—Evidence against.**

When it is sought to fix the estate of a deceased person with a liability, upon the uncorroborated evidence of an interested witness, the evidence ought to be very clear and free from suspicion. *Ex parte Simpson*, 2 *Pug.* 142.

**35—Replevin—Writ—Identifying property.**

In replevin it is not necessary to put the writ in evidence for the purpose of identifying the property seized with that described in the declaration. *Davidson v. King*, 3 *Pug.* 398.

**36—Penalties and fines.**

Penalty for breach of by-law, St. John, in nature of a civil suit. Defendant entitled to give evidence on his own behalf under Consol. Stat. cap. 46. See By-Law 8. *Ex parte Trask*.

**37**———Penalty for solemnizing marriage without consent of parent, being a criminal proceeding, the defendant is not a competent witness. *Regina v. Gallant*, 3 *All.* 115.

**38—Son assault demesne—Replication not necessary—Evidence of excess.**

In an action of assault and battery to which the defendant pleads the plea given by the Common Law Procedure Act (Consol. Stat. cap. 37, schedule B, No. 41) "That the plaintiff first assaulted the defendant, who thereupon necessarily committed the alleged assault in his own defence," the plaintiff may under the general form of replication joining issue on the plea (Consol. Stat. cap. 37, sec. 75) and without replying excess, shew that although he committed the first assault the defendant was guilty of excess. *Savage v. Hack*, 1 *P. & B.* 604.

**Action for general average contribution.**

Usage negating claim to general average contribution; burden of proof on defendant. See Shipping Law 16. *Cameron v. Domville*.

**Insurance—Breach of certain conditions in policy—Issue joined thereon—Proof necessary.**

See Insurance 44. *Martin v. Mutual Ins. Co.*

**Replevin—Plea, non tenuit.**

Evidence of fraud can be given under plea. *See McLeod, Assignee, &c. v. McGuirk*, 2 Pug. 238.

**Insurance policy Statement of facts.**

*See Insurance 48. Gibson v. N. B. & Mercantile Ins. Co.*

**Ejectment—Administrator's deed under license to sell—Petition stating necessary facts on application for license.**

*See License 12. Doe dem. Bowen v. Robertson.*

**Ejectment—Sheriff's Deed—Sale under an alias, the original execution need not be proved.**

*See Sheriff's Deed 6.*

**Replevin.**

*See Pleading II. 27-30.*

**Acceptance of bills by incorporated company.**

*See Bills and Notes II. 20. Berton v. Central Bank.*

## IV.

## PARTICULAR FACTS.

**1—Administration.—Letters of are evidence of the Intestate's death.**

*See Scribner v. Gibbon*, 4 All. 182.

**2—Administrator's deed—Affidavit—Evidence of what.**

The affidavit endorsed on a deed purporting to be made by an administrator under a license from the Probate Court, is not evidence of the death or granting of administration; but only that the land has been duly advertised and sold. *Doe v. Donoran*, 4 All. 116.

**3—** *Quære*, Whether the affidavit required to be endorsed by the Rev. Stat, cap. 136, sec. 42, on an executor's deed, is evidence of any of the proceedings except the advertising and sale of the land. *Doe v. Thompson* 4 All. 483.

**4—Agency.**

*Semble*, That the fact of agency may be proved by parol, though the appointment was in writing. *See Welsh v. Street*, 8 All. 251.

**Agent Accredited.**

*See Corporation 4.*

**5—Lease—Duplicate originals—Primary evidence.**

The defendant let land to the plaintiff, and a lease having been written, A., by their direction, and in their presence, affixed seals and signed their names to it; it was then agreed that A. should make a copy of the lease, and execute it for them in the same manner; he did so, and a few days afterwards, in the presence of both parties, delivered one copy to the plaintiff and the other to the defendant. *Held*, That they were duplicate originals, and that either of them was primary evidence. *Leonard v. Young*, 4 All. 111.

**6—Proceedings against Administrator.**

It is sufficient to shew the substance of the proceedings against an administrator in the Probate Court, without setting out the proceedings themselves. *In re Hunter*, 1 Han. 233.

**7—Coal—Merchantable quality—Evidence.**

In an action on a contract to deliver "Albert Coal," an article known to be used in the manufacture of oil, the breach being that the defendants had delivered coal of an inferior quality, yielding less oil per ton than coal of a good merchantable quality, evidence is not admissible on the part of the defendant to shew how much oil per ton was obtained by another manufacturer from Albert Coal, without also shewing that it was the same quality of coal as that delivered by the plaintiff. *Spurr v. Albert Mining Co.*, East. T. 1871.

**8—Ouster—Tenants in common.**

Proof of the defendant's having locked the gate against the plaintiff, endeavouring to exclude him from the joint

property, and of his having refused to suffer the plaintiff to enter, denying his title, is evidence of Ouster, and was improperly withheld from the jury. *Brown v. Moore*, 2 *Pug.* 42.

**9—Ouster—Sufficiency of Evidence of.**

The plaintiff claimed under deeds from the heirs of P. S., the defendant under a deed from his mother, one of the heirs of P. S. The defendant stated in his evidence that he cut the hay on the land in dispute to prevent the plaintiff, (his co-tenant), having the benefit of it, and that he at the time denied the plaintiff had any right to the land whatsoever. *Held*, That this was sufficient evidence of an Ouster, and that the jury should have found for the plaintiff.

Under these circumstances the defendant's counsel had no right on cross-examination to ask the defendant the following and similar questions:—"When you went on the land did you go with any object except to get the benefit of your mother's right, whatever that was?" And the answer to these questions should have been rejected. In the question of Ouster, it is immaterial what the defendant may have thought he had a right to do under the deed. The question is, what did he intend to do, and what did he do, in reference to the produce and profit of the land? *Allison v. Smith*, 1 *P. & B.* 199.

**10—Agreement of purchase—Trust deed—Power of Attorney—Appointment under of third party—Fraud—Equitable defence—No answer at law.**

A. R. being in financial difficulty executed a power of attorney to G. M., to convey all his estate to J. M. and J. R. in trust to pay his creditors, and in case either of them should die or refuse to act to such person or persons as G. M. should appoint. J. R. refused to act, and G. M. conveyed to J. M. and A. B. J. M. died, and subsequently A. B. sold a parcel of the land to G. M. and conveyed it by a deed purporting to be made between J. M. and A. B., trustees, of the one part, and G. M. of the other part. *Held*, That the conveyance under the power of attorney was good,

that the estate vested in A. B., the surviving trustee; that the deed from him to G. M. was good, and that G. M.'s title was complete. On the trial of this case the defendant's counsel offered evidence (1) of the amount to be paid for the land in question; (2) of the particulars of a purchase by G. M. at Sheriff's sale, of A. R.'s property, by which it was alleged that he had fraudulently contrived to get the rest of A. R.'s real estate for a small consideration, in consequence of which A. R.'s creditors got nothing out of the estate; (3) that the defendants had always been ready to pay the purchase money, but had been unable to find anyone authorized to receive it. The evidence was rejected by the learned Judge. *Held*, That it was properly rejected. Though the Judges of the Supreme Court have jurisdiction over cases in equity as well as in law, the principles and rules which govern the administration of justice in these Courts are as distinct as they were before the passing of the Act 17 Vic., c. 18. Sitting at Nisi Prius and hearing an action of ejectment, the Judge has only to decide upon the legal rights of the parties, and if the plaintiff makes out a legal title to the property, he is entitled to recover, even though the defendant may be entitled to relief in equity. *Doe. dem. Moffat v. Thompson, et al.* 1 P. & B. 516.

#### **11—Gas consumption—Meter.**

In an action by a Gas Company against a consumer of their gas, it was held (per Allen C. J. and Duff—Wetmore J. diss.) that had it been shewn that the Company had placed in the defendant's premises a meter duly verified and stamped, the indication of it subject only to being tested and corrected in the manner pointed out by the Legislature, would be conclusive upon the parties; but that defendant was not bound by an unverified meter. *St. John Gas Light Co. v. Clerke*, 1 P. & B., 307.

#### **12—Land—Whether granted or not—General understanding.**

Whether lands are granted or not cannot be proved by evidence as to what is generally known and reported in the place where the lands are situate. *Davidson v. King*, 8 Pug. 896.



**13—Highways—Laying out of.**

The return of the Commissioners of Highways properly made and filed, is evidence of the laying out of the street. *Regina v. McGowan*, 1 P. & B., 191.

**14—Highways—Commissioners' Return. ;**

The return of the Commissioners of Highways, properly made and filed, is evidence of the laying out of the street. *Regina v. McGowan*, 1 P. & B., 191.

**15—Insolvent Act—Trader.**

In a case of compulsory liquidation, the judgment of the County Court Judge adjudicating the party insolvent, is *prima facie* evidence of his being a trader. *McGuirk v. McLeod*, 2 Pug. 823.

**Estoppel—When may rely on same in evidence without pleading it.**

*See* Estoppel 29.

**Insolvency—Demand of assignment made by party.**

*See* Insolvent Act. *McLeod v. Domville*.

**Alien—Evidence of being one.**

*See* Alien.

**Appeal — Evidence produced — Examination before Master—Court not bound to use it—When?**

*See* Supreme Court in Equity.

**Unstamped check—Void—Not receivable in evidence.**

*See* Check 1.

**Bankrupt—Fiat provenable by certified copy.**

*See* Bankrupt 2.

**Bills of exchange.**

*See* Bills and Notes.

**By-Law—Must be proved.**

*See* By-Laws.

**Chattel—Unregistered ship—Revesting of possession.**

*See* Shipping Law 6.

**City Court—Judgment by default—Proof of particulars—Custom.**

*See City Court.*

**Composition deed—Execution of.**

*See Deed IV.*

**Crown grant—Boundaries—Lines.**

*See Crown Grant.*

**Custom duties—Goods liable for.**

*See Customs Duties.*

**Deed—Acknowledgment—Execution.**

*See Deed I.*

**Deed of Master in Chancery—Prima facie evidence of proceedings.**

*See Deed I. 17.*

**Deed Registry Book—One registry of two deeds on same paper.**

*See Deed I. 23.*

Registrar may be called to prove day of registry and that certificate of acknowledgment was upon deed at that time. *Doe v. Fen*, 5 All. 540.

That party was Registrar of County where lands lie may be shewn by extrinsic evidence. *See Deed I. 42.*

Deed Registry Book best evidence of registry of deed. *See Deed V. 13.*

**Deed of Sheriff—Recital of other judgments—Proof not necessary.**

*See Sheriff's Sale 1.*

Deed receivable in evidence as part of *res gestæ* without proof of judgment or execution. *See Doe v. Baxter*, 4 All. 181.

**Docket of judgment.**

Not necessary to prove docketing of judgment, under claim by virtue of Sheriff's sale under execution. *See Doe dem. Barlow v. Hatfield*, 1 Kerr 417.

**Foreign law—Written law how proved.**

*See Foreign Law.*

**Insurance—Preliminary proof.**

*See Insurance 38.*

**Insurance—Waiver of proof of loss.**

*See Insurance 33 a.*

**Identity.**

*See Identity (Name).*

**Limitation—Payment relied on to take case out of operation of Statute—Necessity of affirmative evidence.**

*See Limitation of Actions II. 2.*

**Marriage.**

*See Infra VI. 3.*

Memorial of Judgment registered against the Vendor is evidence of an incumbrance on the land. *See Scott v. Garrett, 2 All. 624.*

**Mesne Profits—Evidence in action for.**

*See Ejectment (Mesne Profits).*

**Negligence.**

*See Action on the Case II.*

**Contributory Negligence.**

*See Negligence.*

**Usage—Evidence admissible to prove doubtful contract, but not to contradict one that is plain.**

*See McGivern v. Provincial Insurance Co. 4 All. 64.*

**Voluntary Conveyance.**

*See Deed II.*

V.

PAROL EXPLANATIONS.

**1—Contents of deed destroyed—Sufficiency of proof—Lost deed—Ancient deed.**

Where the only evidence of the contents of a deed that

was destroyed many years ago, was that of witnesses who had read it and heard it read, who stated that it was a deed from A. P. and his wife, to their daughter R. E. of the land where she lived, either sixty or eighty rods; that it had the name of A. P. and his wife to it, and it was to R. E. her heirs and assigns for ever, and the date was some time in the last century. *Held*, That sufficient did not appear to enable the Judge to direct the jury that such was a deed of feoffment, or to determine its legal operation or effect.

*Quære*, Whether the contents of an "ancient deed" can be proved by parole evidence, or whether the deed itself must not be produced *Doe dem Edgett v. Stiles*, 1 Kerr 388.

### **2—Bill of parcels—Representation as to quality.**

The delivery of a bill of parcels after the sale of goods, on which a receipt was given for the price, does not exclude parole evidence of the representation as to quality. *Magee v. Street*, 1 All. 242.

### **3—Term "grandson."**

The term "grandson" in its primary sense means a legitimate grandson: and where there is a legitimate grandson to take by this description, and nothing on the face of the will to the contrary, parol evidence is not admissible to shew that an illegitimate grandson was intended. *Doe v. Taylor*, 1 All. 525.

### **4—Agreement—Reference to account.**

Defendant agreed, in writing, to deliver plaintiff a quantity of logs, for which the plaintiff agreed to pay him, after paying the amount of the defendant's account due the plaintiff, at the rate of sixteen shillings per thousand feet. *Held*, in an action on this agreement, That parol evidence was admissible on the part of the defendant, to show what the account referred to in the agreement was, and to identify an account rendered to him by the plaintiff, as the account so referred to. *Des Brisay v. Glencross*, 1 Han. 106.

### **5—Written Lease—Lot to be occupied.**

Where a written lease of a farm excepted a part of it,

described as Lot No. 2, parol evidence is inadmissible to shew that it was agreed between the parties at the time of the bargain that the tenant should also occupy Lot No. 2. *McElweny v. McKilligan*, 1 *Han.* 322.

**6—Sheriff's deed—Affidavit—Different dates.**

Where a Sheriff's deed and his affidavit of due execution and sale, bear different dates, parol evidence is admissible to prove that they were executed on the same day. *Doe dem. Cornell v. Dickinson* 1 *Han.* 456.

**7—Explanations—Agreement in writing.**

Plaintiff and M. built a vessel, of which defendant became master, purchasing a sixteenth from M. and a sixteenth from plaintiff, which he did not pay for. The vessel being in difficulties at Boston, U.S., and \$1,240 due defendant for wages, he, in consideration of \$1,000, by deed of sale transferred to plaintiff all his right in the vessel, and released all claim on account of wages. *Held*, in an action to recover the price of the sixteenth, That parol evidence was admissible to prove that plaintiff, at the time of the deed being executed by defendant, verbally agreed to renounce all claim to the purchase money. *Lingley v. Smith*, 1 *Han.* 589.

**8—Sale of Wharfage—Written Conditions—Verbal statements by Clerk.**

The City Council of F. sold to plaintiff, by public auction, the right to wharfage in the city. Previous to the sale the chairman of the Building Committee for a City Hall, which was about being constructed, had obtained from the City Council permission to reserve the right to use the wharves for the contractors for the building. The written conditions for the sale stated that the "City reserves the right to use any wharf for city purposes only." The City Clerk, however, attended the sale, and an answer to an inquiry by a bidder, stated publicly in plaintiff's hearing, that under the reservation of right to use the wharf for city purposes, the materials for the City Hall would be free from wharfage. Defendants were contractors for building the City Hall, and landed their materials

on one of the wharves in question. Plaintiff claimed the wharfage and recovered in the County Court. *Held*, On appeal, per Weldon, Fisher and Wetmore, J. J., that the terms of plaintiff's purchase must be governed by the written conditions of sale read thereat, and that the reservation "for city purposes" would not exempt defendants from wharfage; but per Allen, C. J., and Duff, J., that the statement of the City Clerk was not contradictory of the written conditions, but only explained what was intended by the reservation; that plaintiff did not buy the right to collect wharfage for materials used for City Hall, and was, therefore, not entitled to recover. *Currier v. Crosby*, 1 P & B. 464.

#### **9—Certificate of Registrar.**

A certificate of the Registrar is sufficient, even though he does not certify that he was the Registrar of the county in which the lands lie, or that the deed was registered in such county, and that it could be shewn by extrinsic evidence that he was the Registrar of the County. *Doe dem McKenzie v. Mosher*, 2 Pug. 355.

#### **10—Policy of Insurance—Warranties—Verbal Agreement cannot vary.**

Defendants issued a Policy of Insurance to plaintiff, insuring his dwelling-house against fire. One of the conditions of the policy required that "all applications for insurance must be made in writing prepared by an authorized agent of the Company, and signed by the applicant, or by his authority; and all statements contained in the applications will be taken and deemed to be warranties on the part of the assured." In plaintiff's application for insurance he stated that the size of his house was 28x30 feet; that it had been built only about six years, and that it was painted inside and outside. In fact, the size of the house was 24x29 feet; it had been built about thirty years, and was only painted on the inside. The house having been burnt, and an action brought on the policy, the Company pleaded these mis-statements of the

plaintiff as an answer to the action. The plaintiff, in reply to this, pleaded that the Company's agent applied to him to insure, that he was absent from home at the time and did not know the exact size of the house, and so stated to the agent, who verbally agreed with him that the statement in the application should not be considered a warranty of the size of the house, and that if it differed from the size stated in the application, it should not be considered a mis-statement. There was a similar statement with regard to the length of time the house had been built, with this addition, that plaintiff stated to the agent that he believed the house had been built twenty-five or twenty-six years, and also that he had stated to the agent that the house was painted on the inside only. *Held*, on demurrer, That these were no answers to the defendants' pleas; that by the conditions of the policy the statements of the age, size, &c., of the house were expressly made warranties, and that the written contract could not be varied by a mere verbal agreement. *Dingee v Agricultural Ins. Co., &c.*, 3 *Pug.* 80.

See also Insurance 42, 44.—*Martin v. Mutual Fire Ins. Co.*—*Bangor Ins. Co. v. McLeod.*

#### **11—Entries in books of account.**

The fact that the plaintiff charged the goods in his books and made out his bills to the person who got them is not of itself conclusive, it could be shewn that the credit was given to another. *Smith v. Andrews*, 1 *P. & B.* 541.

**12**———Entries in books of account are not conclusive against the person making them, but may be explained. *Raymond v. Cummings*, 1 *P. & B.* 544.

#### **13—Sale of land—Identification.**

Defendant by writing addressed to the plaintiff stated that he would "take property" and give his notes for a certain sum—plaintiff wrote on the same paper that he could not sell "property" but would "re-deed to H" and take notes for a certain sum, specifying the time of payment: to which the defendant agreed. Plaintiff proved that H.

had conveyed to him the equity of redemption in a certain property.—*Held*, That this sufficiently indicated the property referred to in the agreement; though if necessary, parol evidence was admissible to show what property the agreement related to. *Pugsley v. Gillespie*, 1 *Pug.* 195.

**Scientor.**

Offering to prove the account which defendant's family gave of way in which dog came to bite. *See Evidence*, III. 30. *Wilmot v. Vanwart*.

**Parol Evidence not allowed to amend Sheriff's endorsement of return on writ.**

*See Johnston v. Winslow*, *Ber.* 53.

**Sale of land—property referred to—Parol explanation**  
*See Sale.*

**Parol evidence admissible to shew what property agreement related to.**

*See Identity. Pugsley v. Gillespie.*

## VI.

### PRESUMPTIVE EVIDENCE.

*See Presumptions.*

**1—Surrogate—person acting as such.**

It will be presumed that a person acting as Surrogate has taken the oath of office ; but if he has not, his acts will not be invalid if he has been appointed to the office. *Crookshank v. McFarlane*, 2 *All.* 544.

**2—Necessary affidavit—Court confirming Certificate.**

It will be presumed that the Court of Chancery in confirming a certificate, acted on a sufficient affidavit of the bankrupt, as required by the Act 6 Vic. cap. 4, sec. 25. *Morrison v. Albee*, 2 *All.* 145.

**3—Marriage—Commissioner's Acts.**

In an action for *crim. con.* the fact of the plaintiff's marriage may be proved by any person present at the ceremony, and if performed by the Commissioner under the Act of Assembly 8 Geo. IV, cap. 9, it will be presumed (at least in



the absence of proof to the contrary,) that he was acting within his authority, and followed the requisition of the Acts as to the notification and form of the solemnization. *Montgomery v. McLeod*, Ber. 375.

The original certificate of marriage filed with the Clerk of the Peace, as directed by the Act 52 Geo. II. cap. 21, may be given in evidence, without calling the subscribing witness. *Montgomery v. McLeod*, Ber. 375.

#### **4—Prima facie proof of Marriage.**

The land in dispute in an action for trespass, was granted to A. The defendant claimed under a deed from B., and in order to prove that B. was a daughter of A. called a witness, who stated that he knew A. and his family—enumerating them—and including B. as one of the daughters: the witness was not cross-examined. *Held*, Sufficient *prima facie* evidence of the marriage of A., and that B. was one of his daughters. *Power v. Hewie*, Mich. T. 1864.

#### **5—Corporation—Persons acting as president and secretary.**

The Act 7 Wm. IV. cap. 54, incorporating the New Brunswick and Marine Assurance Company, required that policies should be subscribed by the president and countersigned by the secretary. *Held*, That a policy so signed was valid without the seal of the Company, and that evidence of these persons having acted as president and secretary was *prima facie* evidence of their appointment. *Dimock v. New Brunswick and Marine Assurance Company*, 1 All. 398.

#### **6—Person practising as Surgeon.**

Evidence that the defendant practised as a surgeon is sufficient proof that he was such. *See Kelty v. Dow*, 4 All. 485.

#### **7—Rebuttal of presumption—Payment of debt—Omission in Schedule of debtor—Evidence to shew mistake.**

As a defence to an account stated, the defendant shewed several payments since the settlement, and also that the

plaintiff had applied for relief under the Insolvent Act 7 Vic. cap. 32, and in his schedule of debts sworn to and exhibited before the Master of the Rolls, the demand in question was not included, but the plaintiff's clerk stated that the list of debts was made out by him, and that the demand was omitted by mistake. *Held*, Sufficient to rebut the presumption that would otherwise have arisen that the debt was paid. *McDonald v. Cother*, 3 Kerr 394.

**Sheriff's deed—Regularity of Proceeds.**

*See* Sheriff's Deed 2.

**8—Sheriff's deed more than twenty years old.**

In making title under a Sheriff's deed more than twenty years old, where the sale was under a *venditioni exponas*, and the land had been advertised in the Gazette—*Held*, in the absence of evidence to the contrary, 1st, That a legal levy had been made under a *fi. fa.* 2nd. That no newspaper was published in the county. 3rd. That the other notices required by the Act had been given; and 4th, That the sale took place during the hours prescribed by law. *Doe v. Hazen*, 3 All. 87.

**9—Presumption against defendant, not being called as a witness.**

Where the defendant knew all the circumstances, and might have been called as a witness to shew the exact quantity of the property in dispute which came to his possession—*Held*, That it was not a mis-direction to tell the jury they might infer that if the defendant had been called, his evidence would not have benefitted his case,—an inference, though slight, that the whole of the property in dispute came into the defendant's possession is much strengthened by the fact that it was in his power to show the exact amount, and that he has not done so, and the jury are thereby warranted in adopting such inference. *Tufts v. Hatheway*, 4 All. 62.

**10—Absence of evidence by defendant.**

In an action to recover the price of logs, the plaintiff, in order to prove the quantity received by the defendant,

shewed the average size and number of logs put in and driven down a stream, at the mouth of which defendant had a saw-mill, and that the defendant had sawn a portion of them. *Held*, in the absence of any evidence by the defendant of the quantity he had sawn, That the jury were justified in presuming he had received the whole quantity driven down the stream by the plaintiff. *Leslie v. Hanson*, 1 *Han.* 268.

**11—Conduct of party—Implied recognition.**

A recognition may be implied from the conduct of a party, as where knowing of a warrant of Attorney and judgment against him, he allows them to stand for three years without objection, and continues to deal with the plaintiff on the security of them. *Hutchinson v. Johnston*, 4 *All.* 40.

**12—Right of way—Presumption of deed.**

To sustain a plea of right of way by lost deed, no proof is requisite of such deed having actually existed, but the jury have a right to presume such deed from long and uninterrupted usage of a way exercised as a matter of right, and necessary to the convenient enjoyment of the land to and from which the road leads. *Jones v. Jones*, 2 *Kerr*, 265.

**13—Master and servant—Payment of passage money from travellers.**

No presumption that same was paid over in ordinary course of employment without proof that such was course of dealing. *See Rae v. McBeath*, 3 *Kerr* 446.

**14—Issue of Writ.**

In the absence of evidence of the actual time of issuing a writ of *mesne* process, it will be presumed to have issued on the day it bears date. *Pomeres v. Provincial Ins Co.*, *Hil. T.* 1873.

**15—Light and air—Prescription—User Presumption of grant—Knowledge of owner of adjoining land necessary.**

No grant is necessary to authorize a person to put

windows in a house on his own land, and if the owner of the adjoining land allows the light and air to pass into and through them uninterruptedly for a period of twenty years, it will be inferred from such non-obstruction for that period of time, that the adjoining owner has consented to the enjoyment of such light and air, and for the purpose of quieting the title, a grant of the right will be presumed. However, no such grant will be presumed unless the owner of the adjoining land, and those through whom he claims his title, knew or had the means of knowing that the light and air were being so enjoyed. *Ring v. Pugsley*, 2 P. & B. 303.

See Now Consol. Stat., cap. 81, providing that no right of user of light or air to be acquired by prescription or user.

**16—Question for Judge not jury.**

The question as to whether or not the grant is to be presumed, is one for the judge and not for the jury. *Ibid.*

**17—Presumption irrespective of proof to the contrary**

The presumption of a grant is raised entirely from the fact of uninterrupted possession of twenty years, unexplained and un rebutted, and will be raised although the owners of the adjoining lands testify that they never gave a grant, and although the records shew no grant. *Ibid.*

**18—No presumption when owner cannot resist.**

When the owner of the adjoining land has no means of resisting the opening of the windows, or of obstructing them afterwards, no presumption is raised against him. *Ibid.*

**19—Conversations—Evidence.**

The defendant, subject to objection, gave evidence of a conversation between Mr. Burns, the person through whom he claimed, and Mr. Adams, the person who owned the house in which the windows were opened, relative to their opening, which conversation took place after Burns had parted with his title to the lot in question. *Held*, That the conversation could not be admitted in evidence to affect the case. *Ibid.*

**20—Damages.**

In an action for obstructing the plaintiff's lights, a fair measure of damages is the cost of making such alterations on the plaintiff's house as will be necessary to obtain the same quantity of light and air as he had enjoyed before the obstruction. *Ibid.*

**21—After acquired property—Absconding debtor.**

Proof that an absconding debtor had property subsequent to the issuing of a warrant against him, does not raise a presumption that he owned it at the time the warrant issued. *Cullen v. Voss*, 2 *Pug.* 464.

**22—Mens Rea.**

If a man knowingly does acts which are unlawful, the presumption of law is that the *mens rea* exists; ignorance of the law will not excuse him. *Regina v. Mailloux*, 3 *Pug.* 494.

**23—Withholding Evidence.**

Where a party has it in his power to give evidence of a particular fact and does not give the best evidence within his reach, the presumption ought to be against him. *Briggs v. McBride*, 1 *P. & B.* 663.

Defendant entitled to benefit of doubt, where plaintiff leaves matter in doubt. *See* Absconding Debtor 17. *Cullen v. Voss.*

**24—Letter—Intestate—Claim for Wages.**

In an action for wages due the intestate as master of a ship a letter written to him by the owner, offering to employ him at a certain rate, is evidence of the rate of wages; and it will be presumed that the offer was accepted and acted on by the master. *Dorman v. Anderson*, 5 *All.* 215.

**25—Will—Interlineations in.**

Where interlineations appear in a will which are not noted, after a long lapse of time, a strong presumption may be raised that they were made before or after the

execution of the will, according as the possession, title, &c., have run, and as the parties interested appear to have acted. *Doe dem. McVey v. Daniel*, 2. *Pug* 372.

**26—Loss of Vessel.**

A vessel insured from the 10th March, 1868, to the 10th March, 1869, sailed from S. the last of February, 1869, on a voyage to C. The pilot left her at L. proceeding on her voyage, but she did not arrive at her port of destination, and never was heard from afterwards. About the same time she left S. another vessel sailed from the same port on a like voyage to C., and on the 6th and 7th of March encountered an unusually severe gale, after which the weather moderated and continued so for the remainder of the voyage. *Held*, Evidence from which a jury might presume the vessel insured was lost before the 10th March. *Pomares v. Minas Marine Ins. Co.*, 3 *Pug*. 245.

**27—Ejectment—Judgment, &c., in former suit—Wrong-possession.**

In an action of ejectment, the lessor of plaintiff put in evidence a declaration and judgment by default in a former ejectment suit brought by him for recovery of the same premises against Richard Roe, the now defendant being the tenant in possession, and showed the issue of a writ of *habere facias*, and its execution by the Sheriff, and the turning of defendant's wife and family out of possession. It was also proved that the lessor of the plaintiff thereupon leased the property to defendant's wife, and subsequently made with her an agreement to sell to her for a price named. She only paid some small amount, and the lessor of plaintiff demanded possession from defendant's wife, and brought the present action. No evidence was given to connect defendant with the lease or agreement of purchase, nor was it shewn that he lived on the property, but it was proved that on one occasion defendant's wife told the lessor of plaintiff that she and her husband did not live together. *Held*, per Weldon, Fisher and Wetmore, J. J., That as the judgment and execution of *habere facias* in the former

suit, and the lease to defendant's wife, and agreement for purchase proved possession in the lessor of plaintiff, and as defendant, by the consent rule, admitted he was now in possession, he must be presumed to be wrongfully there, and that the lessor plaintiff was entitled to recover; but per Allen, C. J., and Duff, J., that defendant was not estopped by the lease to his wife, and the burthen was on the lessor of plaintiff to show that she was acting under her husband's authority. *Doe dem. Beveridge v. Henderson*, 2 *Pug.* 16.

**28—Letter—Ambiguity.**

If language in a letter is ambiguous, it must be construed most strongly against the writer. *See Accord, etc. 2 Weldon v. Vaughan.*

**Doubt raised by Evidence—Presumption that note was given in accordance with agreement set out in declaration.**

*See Pleading I. 26.*

**No Administration Bond—Presumption that no administration granted.**

*See Executors and Administrators IV. 1.*

**Attorney—Authority to issue Execution.**

*See Attorney V. 4.*

**Re-survey of Lumber—presumed to be made according to Act.**

*See Rankin v. Emery, Ber. 330.*

**Unlawful Act—Knowledge—Master and owner of Ship.**

*See Principal and Agent. 22.*

**Letters Patent—Proper issue of.**

*See Corporation 6.*

**Publications in newspaper—Authority.**

*See Joint Stock Company 3.*

**Commission to examine witnesses—Presumption as to.**

*See Infra IX. 2.*

**Presumption that Payee had given notice of dishonour of bill.**

See Bills and Notes IV. 2.

**Omnia Presumuntur contra spoliatorum.**

See *Infra* XI. 45. *Smith v. Lunt*.

**Seal of Commissioners taking depositions.**

See Evidence IX. 11.

Commissioners of sewers appointed under Act of Assembly acting in that capacity is *prima facie* evidence of being commissioners and of regularity of assessment. See *Will. Knapp v. King*.

**Summary conviction for unlawful assault—complainant attending on prosecution—intendment that prayer to proceed summarily was made.**

See Justice of the Peace, IV. 26. *Regina v. O'Leary*.

**Wilderness land.**

A plea cannot be proved by presumption that the title to all wilderness land is in the Crown. See Pleading II. 58. *Ogden v. Burgeois*.

## VII.

## SECONDARY EVIDENCE—NOTICE TO PRODUCE.

**1—Certified copy of Will.**

*Semble*, That a certified copy of a will cannot be given in evidence under the 1 Rev. Stat. cap. 112. *Connell v. Haley*, 4. *All*. 686.

**2—Will.**

Secondary evidence of a will devising real estate in this Province, the original will being filed in the office of the Surrogate General of Nova Scotia, is not admissible, there being no evidence of any law of Nova Scotia prohibiting the removal of the will. *Doe dem. Gilmour v. Whitney*, *Ber*. 389.

**3—License to sell Land—Copy.**

A license by the Governor in Council to an administra-



tor to sell land, granted under the Act 26 Geo. III., cap. 11, need not be under seal; and it may be proved by a copy from the records of the Council, certified by the Clerk of the Executive Council, under the Act 21 Vic., cap. 3, sec. 7. *Caughey v. Inman*, 5 All. 399.

#### **4—Inventory—Examined copy.**

An examined copy of an inventory, filed by the administrator in the Registry of the Court of Probates, pursuant to the Act of Assembly 3 Vic. cap. 61, is admissible in evidence, and the original need not be produced. *Canliffe v. Morehouse*, 2 Kerr 311.

#### **5—Affidavit—Exemplification.**

In an action for a malicious arrest upon a bailable capias issued out of this Court, the affidavit upon which the writ issued having been filed, may be proved by an exemplification under the seal of the Court; and proof of the defendant's signature to the original affidavit is not necessary, if it appears that the arrest was made by his procurement. *Wentworth v. Hallett*, 2 Kerr 560.

#### **6—Surrogate's book—Private entry.**

An entry of the grant of administration in a book kept by a surrogate, which is stated to be a private book, is only secondary evidence, and therefore not admissible without proof of search for the letters of administration. *Doe v. Read*, 1 All. 31.

#### **7—Judge's Notes.**

The Judge's notes of the testimony of a witness since deceased, are evidence in a subsequent trial of the same cause to prove that witness's testimony, though the second trial is before a different Judge. *Doe v. Murray*, 1 All. 216.

**8**———The evidence of a witness who has left the Province since a former trial between the parties, may be read from the Judge's notes. *Abel v. Light*, 6 All. 423.

#### **9—Notice to Produce—Time—Record Improperly held.**

In an action of replevin, both parties filed *Nisi Prius* records. The cause was tried on the defendant's record,

and the plaintiff obtained a verdict. The Clerk of the Circuit, by mistake, indorsed the *postea* on the record filed by the plaintiff, and gave it to his attorney : the defendant's attorney afterwards got the other *Nisi Prius* record. In an action of assumpsit afterwards brought by the defendant in the replevin suit against the plaintiff, it became necessary, in order to admit, from the Judge's notes, the testimony of a witness examined in the replevin suit, to prove that trial : notice to produce the *Nisi Prius* record which had been given by the Clerk to the defendant's attorney ( the plaintiff's attorney in the present action) was served on him about seven o'clock in the evening previous to the trial, but he, objecting that the notice was too short, refused to produce it. *Held*, in the absence of any affidavit from the attorney explaining why he took the record, or why he could not produce it, That the notice was sufficient—the record being improperly in his possession ; and that, under the circumstances, it was his duty to use more than ordinary exertions to return it to the Clerk. *Abel v. Light*, 6 *All.* 423.

**10**———*Quere*, Whether a copy of a notice from the plaintiff to defendant, complaining of delay in furnishing certain materials for a building, was admissible in evidence without a notice to produce. *Small v. McCullough*, 3 *All.* 484.

**11**———*Semble*, That a notice to produce " all papers, memoranda, receipts and accounts *settled* relating to this suit," is not sufficient to let in secondary evidence of an unsettled account. *See Rose v. Lindsay*, 3 *Kerr* 645.

**12—Entries transcribed—Contents of Logs.**

Logs were measured as they were sawed in a mill, and their contents marked on a board by the persons who sawed them. At the end of each week, the figures on the board were transcribed into a book by a person who had made a part of the measurements, but who could not tell, from the character of the figures on the board, what portion of them was made by either of the other parties. *Held*, That the book was not evidence to prove the quantity of logs sawn, without calling all the persons who had measured the logs. *Leslie v. Hanson*, 1 *Han.* 263.

**13—Payment under written agreement—Production of agreement necessary.**

One item in an account of money paid by the plaintiff for the defendant, appeared on cross-examination to have been paid under a written agreement by the defendant to deliver goods to the plaintiff. *Held*, That without production of the agreement the plaintiff could not recover on this item. *Harley v. Goodfellow*, 1 *Han.* 335.

**14—Loss of document—Proof of—Sufficiency—Question for Judge.**

The sufficiency of preliminary proof of the loss of a document to entitle secondary evidence to be received, is a question for the judge at the trial to determine. *Gilbert v. Campbell*, 1 *Han.* 471.

**15—Necessary search.**

Where a person is in the habit of preserving and filing away letters of importance, secondary evidence of the contents of a letter of that description is not admissible without search among his letters, there being no proof of its loss. *Little v. Johnston*, 1 *Kerr* 496.

**16—Lost paper.**

Where an agreement for a right of way had been made ten or twelve years before the trial, and the road laid out and used in pursuance of it, secondary evidence of the contents of the agreement was received, it appearing by the testimony of the person in whose possession it was left, that he had searched thoroughly for it, and was sure it was not in his possession, that he might have burnt it as a useless paper, or given it to one of the parties, but had no distinct recollection of what he had done with it, and it was just as probable he had burnt it, as that he had given it to one of the parties. *Busterach v. Atkinson*, 2 *All.* 439.

**17—Search for note.**

Slight evidence of search for a note which has been paid and taken up by the maker, is sufficient to account for its non-production, and to admit secondary evidence of it. *Lyman v. Cain*, 3 *All.* 259.

**18—Certified copy of deed—Affidavit.**

An affidavit made by an attorney, that the lessor of the plaintiff resides in Halifax, N. S., had never been in this Province, had not the deed in his possession, and did not know where it was to be found, is not sufficient to entitle a certified copy of the deed to be given in evidence under 1 Rev. Stat. cap. 112, sec. 12. *Fisher, J., dissentiente. Doe ex dem Trider v McIntosh, 1 Han. 502.*

**19—Document partly destroyed—Contents.**

If part of an original document be lost or accidentally destroyed, the part which is preserved may be admitted in evidence and secondary evidence given to the remainder. *Doe v. Jack, 1 All. 476.*

When a person has made extracts from a paper, he may, after the loss of the original, refresh his memory by reference to such extracts; and where other secondary evidence is produced of the whole instrument, a witness may speak to the contents of a part which he has abstracted, although he has not seen or does not recollect the remainder. *Ibid.*

**20—Certified copy of grant.**

A certified copy of a grant under the Act. 3 Vic., cap. 65, is admissible in evidence, without accounting for the non-production of the original. *Doe v. McDonald 1 All. 673.*

**21—Former testimony of witness—Proof of.**

Where the plaintiff had been examined as a witness on a former trial respecting the same subject, it is necessary, in order to prove his testimony, that the witnesses should swear to the words used by him, and not merely to the effect of them. *Fraser v. Black, 2 All. 312. (See Infra. VIII. 17.)*

**22—Absence of attesting witness—Handwriting.**

Whether due diligence has been used to discover an attesting witness must depend upon the circumstances of each case. *Crane v. Ayre, 2 All. 577.*

Where the attesting witness to a bond left the plaintiff's employment in the country fifteen years before the trial and went to Saint John, and about two years afterwards told two persons of his acquaintance in the country that he was going to Australia, after which neither of them had ever seen him, though one of them had resided in Saint John for three years afterwards, and the other was there frequently, and there was no proof that the witness had been in the Province for thirteen years. *Held*, Sufficient presumptive proof of his absence to admit secondary evidence of his handwriting. *Ibid*.

**23—Ejectment—Title under agreement—Production necessary.**

Where a plaintiff in ejectment proves no documentary or possessory title, but relies upon the estoppel arising from his having let the defendant into possession of the land, and it appears in the plaintiff's case that the defendant took possession under a written agreement; the plaintiff cannot recover without producing the agreement or giving secondary evidence of it after notice to produce. *Doe v. Blanche*, 3 *All.* 180.

**24—Repelling imputation.**

On the trial of an action for breach of promise of marriage, where plaintiff gave evidence of her seduction by defendant, the latter, by his cross-examination of plaintiff, attempted to shew her unchastity before her acquaintance with him. *Held*, That this gave her the right to repel the imputation involved in such cross-examination, not only by her own evidence, but also to vindicate her character by other testimony. *Burke v. Scribner*, 3 *Pug.* 652.

**25—Insurance loss.—Copy report of.**

A report of the circumstances of a loss under policy of insurance, made to the defendants by their agent, a copy of which had been given to the plaintiff is not evidence without notice to produce; and *quære*, Whether it would then be admissible? *Duffy v. Stymart*, 5 *All.* 197.

**26—Witness deceased—Judge's Notes.**

The testimony of a witness, since deceased, given on a former trial between the same parties, may be received in evidence from the Judge's notes, though the suits are different, provided the question in issue in each is substantially the same. *Bennett v. Jones*, 5 *All.* 342.

**Statement of affairs by debtor to creditor—Copy made in presence of debtor.**

*See Supra* I. 12.

**Lease—Duplicate originals—Primary evidence.**

*See Evidence* IV. 5.

## VIII.

## EXAMINATION OF WITNESSES AND EVIDENCE ON TRIAL.

**1—Rebuttal of Testimony.**

A witness for the plaintiff denied on cross-examination having made a statement in presence of L., who was afterwards called, by the defendant, and contradicted him. *Held*, That the plaintiff might call evidence in reply to rebut L.'s testimony and confirm that of his own witness; such evidence not being properly part of the plaintiff's case in the first instance. *Whelpley v. Riley*, 2 *All.*

**2**—The defendants in trespass justified entering, under the Act 13 Vic. cap. 4, as Commissioners of Highways to lay out a road through the land, and proved a return of the road sufficient upon its face. *Held*, That evidence of excess in laying out the road wider than the law allowed, must be given as part of the plaintiff's original case, and was not admissible as rebutting evidence, *Downing v. Gault*, 2 *All.* 569.

*Quere*, Whether evidence of a person not present at the laying out, but who afterwards examined marks on the trees where the road was laid out, is admissible to prove excess? *Ibid.*

**3—Calling witnesses in reply—Surprise.**

Plaintiff and defendant owned adjoining lots in the city

of St. John, the question was, whether a cellar wall running at right angles with the street on which the lots fronted, was wholly within the bounds of the plaintiff's or the defendant's lot—the breadth of the wall being the land in dispute. The defendant's witness was asked on cross-examination, whether after a fire which burnt the houses on both lots, B., under whom the defendant claimed, had not employed F. to remove a stone wall adjoining that in dispute. *Held*, That the Judge was right in allowing the plaintiff to call F. in reply to the defendant's case, and that the admission of his evidence was not such a surprise on the defendant as to entitle him to a new trial. *Adams v. Ferguson*, 4 *All.* 102.

4—Where a witness on cross-examination, denied having signed a paper, but which was not then shown to him, and the opposite party afterwards produced the paper, and gave evidence to prove the witness's signature to it, the witness may be re-called to disprove the signature. *Tompkins v. Tibbits*, 1 *Han.* 317.

**5—Re-examination of witness as to statements concerning matter involving penalty.**

Where a witness called to prove that the consideration of a note was usurious, declined to state what amount he gave on discounting the note, because his answer might render him liable to a penalty, but on cross-examination said he gave what he thought it was worth. *Held*, That he was bound on re-examination to state what he gave. *Peters v. Irish*, 4 *All.* 326.

**6—Proving justification on cross-examination of plaintiff's witnesses.**

The defendant has not a right on the cross-examination of the plaintiff's witness, and before the defence is open, to prove a justification of which he has given notice, and the affirmative of which lies on him ; no question leading to it having been asked on the examination in chief. *Atkinson v. Smith*, 4 *All.* 309.

**7—Payment—Set-off.**

A defendant cannot prove his set-off in plaintiff's case, but a payment rests on a different footing, and in the absence of any evidence of appropriation, the law will *prima facie* apply it to the payment of outstanding indebtedness; and a defendant has a right to shew payment on cross-examination of plaintiff's witnesses. *Frederickton Boom Co. v. McPherson*, 2 *Han.* 9.

**8—Paper not in evidence.**

Though as a general rule (except in legislative enactment) a witness cannot be examined as to the contents of a paper not in evidence, it does not necessarily follow that this is sufficient ground for setting aside a verdict, where the paper is afterwards put in evidence and the opposite party has an opportunity of examining upon it, and it has been allowed to go before the jury—no injustice appearing to have resulted from the evidence. *Lawton v. Tarratt*, 4 *All.* 1.

**9—False imprisonment—Policeman making arrest—Asking question as to whose direction arrest made.**

Defendant lost a cow, which he suspected to have been stolen by the plaintiff; he reported the facts to the Chief of Police, who told him, in the presence of a policeman, that he had better arrest the plaintiff. He then went to the plaintiff's shop with the policeman, and directed him to take the plaintiff in charge, and the policeman arrested the plaintiff and detained him several hours, when the cow was found, having strayed from the defendant's field. In an action for false imprisonment, the policeman stated, in answer to a question from the plaintiff's counsel, that he would not have arrested the plaintiff without the direction from the defendant. *Held*, That the question was proper. *Quære*, Whether the defendant's counsel had a right to ask the policeman on cross-examination, whether he did not make the arrest, in consequence of the direction from the Chief of Police. Though the evidence was improperly re-



jected, it is no ground for a new trial, as the defendant, being a trespasser, by directing the arrest, the verdict must have been in favor of the plaintiff. *Foley v. Tucker*, 1 *Han.* 52.

**10—Discretion of Judge—Contents of written statement.**

It is discretionary with the Judge at *Nisi Prius*, under the power given by the Act 19 Vic. cap. 41, sec. 16, whether he will allow a witness to be cross-examined as to the contents of written statements made by him, without the writing being produced. *Lawton v. Chance*, 4 *All.* 411.

**11**——It is discretionary with a Judge at *Nisi Prius* to receive evidence at any time during the trial. *Stiles v. Brewster*, 4 *All.* 414. (See New Trial III. 85.)

**12**——May admit evidence even after the counsel has addressed the jury, and the Court will not interfere if the evidence is not in itself inadmissible, or no injustice has been done. *Doe v. Connelly*, 3 *All.* 337.

**Recalling witness—Discretionary with Judge.**

See County Court 4.

**12 a—Livery of seisin—Evidence after close of case.**

A deed was put in evidence without objection as a registered deed, but was afterwards discovered not to have been duly acknowledged, whereupon the defendant's counsel objected, in his address to the jury, that it did not give livery of seisin. *Semble*, That the objection was not too late; but that in such a case the judge might allow the opposite party to give evidence of livery of seisin. *Scribner v. McLaughlan*, 1 *All.* 379.

**13—Withdrawing evidence.**

It is discretionary with the judge at the trial to allow the counsel to withdraw evidence. (Per Ritchie, C. J., where evidence is pressed in against the opinion of the Judge, the counsel must stand by it.) *Pelton v. Temple*, 1 *Han.* 275.

**14—Scientific witness.**

A scientific witness cannot be asked questions, the answers to which are based upon previous evidence given by other witnesses, and upon which conclusions are drawn which are for the jury to determine. See *Key v. Thomson*, 2 *Han.* 224.

**15—Party to suit—Hostile witness.**

Where one of the parties to a suit is called as a witness by the other, it is discretionary with the Judge to allow him to be examined as a hostile witness, and to restrict his own counsel to the style of an examination in chief. The opposite party on the record is not necessarily a hostile witness, his conduct on the stand is the proper test. *Atkinson v. Atkinson*, 5 *All.* 271.

**16—Different statement—Proof of—Tender of evidence—Time.**

It is not competent to prove on the cross-examination of a witness, that he has made a different statement relative to the subject matter of the suit in his examination in bankruptcy in England, without producing the original proceedings in bankruptcy. *Campbell v. Gilbert*, 5 *All.* 420.

If, for the purpose of affecting the credibility of a witness (a proper foundation having been laid) and shewing that he had made a different statement on a former occasion. *Quære*, Whether a duly certified copy of his examination in bankruptcy would not be evidence? If so, the evidence should have been distinctly tendered after the close of the case in which the evidence sought to be contradicted was given. *Campbell v. Gilbert*, 5 *All.* 420.

**17—Discrediting Witness—Statements on former trial—Proof of.**

A plaintiff examined as a witness in his own cause may be asked on cross-examination for the purpose of discrediting him, whether, in giving his evidence on a former trial relating to the same matter, he had not made certain statements respecting it without proving by the record that a

former trial took place. And where he denied making the statement, a person who heard his evidence on the former trial, and took it down in writing, so far as he was able, may be called to contradict him, if he can speak positively as to the statements denied by the plaintiff, though he did not take down the whole of his evidence. (See No. 21.) *Bryson v. Hamilton, East. T. 1873.*

**18—Party producing Papers on cross-examination.**

Papers proved on cross-examination are to be treated as the evidence of the party producing them. *Crane v. Clarke, Hill. T. 1828.*

**19—Recalling Witness.**

Where on the trial of an action against one of the sureties in a bond given by a Deputy Treasurer, the Treasurer was examined as a witness on the part of the Crown, and on cross-examination, proved a number of letters written by him to the Deputy,—partly relating to official business, and partly to private transactions and land speculations in which they had been engaged, and had suffered losses,—from which it was intended to be argued by the defendant that moneys received by the Treasurer from the Deputy and carried to his private account, were in fact Crown moneys, and should have been so credited; and these letters were afterwards put in evidence by the defendant. *Held*, That the Treasurer might be recalled by Crown, after the close of the defendant's case, to explain the transaction, and to prove that all moneys remitted by the Deputy on account of the revenue, were duly credited. *Regina v. Kerr, 2 Kerr 187.*

**20**——Where a witness on cross-examination proves documents for the defendant, it must in general be subject to the implied condition that the witness may be recalled by the opposite party after the documents are in evidence. *Ibid.*

**21—Second trial—Testimony—Particularity.**

Where the plaintiff has been examined as a witness on a former trial respecting the same subject, it is necessary,

in order to prove his testimony, that the witness should swear to the words used by him, and not merely to the effect of them. *Fraser v. Black*, 2 All. 312. (See No. 17.)

**22—Examination as to matters in [writing—Partnership.**

Where, on the cross-examination of plaintiff, the defendant's counsel examined him as to the time he entered into a partnership, and his interest in it, the plaintiff was held to be entitled to go into the contents of the whole agreement, although it appeared there were written articles. *Tozer v. Hutchinson* 1 Han. 540.

**23—Privileged communication.**

The rule of evidence that a communication respecting a suit between the agent of the client and his attorney is privileged, is not altered by the Act 19 Vic., cap. 41, sec. 1, allowing the parties to be examined as witnesses. *Lawton v. Chance*, 4 All. 471.

**24—Defendant's witness—Contradicting by plaintiff  
Confirming plaintiff's case.**

Evidence is admissible to contradict a statement of a fact made by a witness for the defendant, though the effect of such evidence may be to confirm the plaintiff's original case. The time at which evidence is admissible is in the discretion of the Judge. *Heavy v. Odell*, 5 All. 524.

**25—Counsel.**

Where a counsel in a cause is by consent allowed to go upon the stand to prove a particular fact, he becomes a witness in the cause generally, and may be cross-examined upon any fact in the cause. *Gilbert v. Campbell*, 2 Han. 55.

**26—Lease—Production necessary.**

In an action of trespass for cutting down a mill-dam, the plaintiff relied on, and gave evidence of possession only. On cross-examination, he admitted that he held the property under a written lease from G., and stated that he

was bound by the lease to keep the premises in repair. *Held*, That the plaintiff was bound to produce the lease, to enable the Judge properly to direct the jury as to the effect of it, and as to the amount of damages which the plaintiff as tenant, would be entitled to recover. *Betts v. Venning*, 1 *Pug.* 267.

**27—Examination of defendant—Recalling.**

If the plaintiff calls and examines the defendant as a witness, he is not, when afterwards examined as a witness in his own case, to be treated as a recalled witness; but his counsel has a right to examine him, and to prove his defence as fully as if the defendant had not been previously called as a witness by the plaintiff. *Ibid.* (See New trial IV. 11.)

**Defendant's Counsel cross-examining on matter—  
Objection made at opening of case.**

See New Trial II. 15.

**28—Rebuttal of immaterial statements—Rejection of  
evidence as to.**

When evidence was offered to rebut immaterial statements, which could not affect the case, the Court held that it was properly rejected. *Hamilton v. Holder*, 2 *Pug.* 222.

**29—Inquiry—refusal to allow cross examination on  
paper put in evidence.**

Wherein an enquiry before a Sheriff under a writ *de prop. prob.* the defendant's counsel was allowed to put a paper in evidence without the plaintiff's counsel being previously permitted to cross examine upon it, the inquisition was set aside. *Hanington v. Cormier* 2 *Pug.* 450.

**30—Opinion of Physician.**

Where a practising physician was allowed to give his opinion of the manner in which *prolapsus uteri* would be caused, and the degree of violence that would produce it, and of the symptoms of the disease and other matters relative to it, without having made a personal examination of

the patient in regard to it, or having heard the other witnesses, it was *held*, that, as his opinion did not in any way depend upon the circumstances detailed by the other witnesses, but entirely upon his knowledge acquired as a medical practitioner by his study and practise in other cases, the evidence was properly received. *Napier v. Ferguson*, 2 P. & B. 415.

*See Witness.*

**31—Paper writing—Plaintiff's possession of—Admissibility of as against defendant or his partner—withdrawal from consideration of jury—Neglect to do so.**

In an action brought by plaintiff against defendant for breach of agreement not to go into business for a certain time, by reason of which breach plaintiff claimed he had been compelled to pay a higher rate of wages, &c., it was *held* that a paper purporting to be a scale of wages paid by defendant's firm, and found in plaintiff's work shop, and which was stated to be in the handwriting of defendant's partner, was properly admitted in evidence : and that the defendant not having previous to its admission called witnesses to prove that it was not written by defendant or his partner, and not having afterwards, when this was proved, moved to have the paper withdrawn from the consideration of the jury could not avail himself of its admission as a ground for a new trial. *Whittaker v. Welsh*, 2 Pug. 436.

**32—Rebuttal of evidence.**

*Held*, also in same case that where defendant in cross-examination was asked if he had not made an admission to T. of his agreement the breach of which was complained of, and denied it, it was competent for plaintiff to rebut this evidence by shewing defendant had made the admission for the purpose of discrediting the defendant, even though it also affected plaintiff's case. *Ibid*.

**33—Witness called by party—Hostile testimony.**

If a witness called to prove a case unexpectedly gives evidence in opposition to it, the Judge may allow the party

calling such witness, to treat him as hostile and to cross-examine him; though the effect of doing so may be to discredit his testimony. *Davidson v. Arsineau*, 5 All 289.

**34—Evidence pressed in.**

Where evidence is pressed in against the opinion of the Judge a new trial may be granted, but whether it will be granted or not must depend upon the circumstances of the case. *McDonald v. Cummings et. al.* 2 Pug. 282.

**35—Counsel in cause.**

Though the practise of counsel in a cause giving evidence is most objectionable, yet a Judge at Nisi Prius has no authority to refuse it if offered. *Bank of B. N. A. v. McElroy*, 2 Pug. 462.

*See Witness.*

**36—Rebutting testimony.**

The mere fact that evidence in reply may tend to support the plaintiff's original case, is no objection to its admission, provided it is given to contradict the statement made by a witness on the part of the defendant.

Rebutting evidence was put in by the plaintiff, not only to contradict the defendant as to his having continuous possession of the land in question, on the trial of an action of trespass, but also to show that the land had been cleared by defendant's father, the possession had afterwards been abandoned by him, and had been taken and kept by the plaintiff. *Held*, That the evidence was properly received, although the plaintiff might have given it in his *prima facie* case. *Briggs v. McBride*, 1 P, & B. 668.

**37—Evidence improperly admitted—Effect of re-examination upon.**

When evidence is improperly admitted on cross-examination, if the other party re-examine upon it, he thereby waives the objection to it. *Smith v. Gerow*, 2 Pug. 425.

**38—Rebuttal of evidence adduced in cross-examination.**

Where the defendant on cross-examination was asked if

he had not made an admission to T. of his agreement, the breach of which was complained of, and denied, it is competent for plaintiff to rebut this evidence by showing defendant had made the admission—for the purpose of discrediting the defendant, even though it also affected plaintiff's case. *Whittaker v. Welch*, 2 *Pug.* 436.

**39**——Evidence may be given to confirm plaintiff's case, not to add to it when the tendency of the evidence is to contradict a statement of defendant. *Ibid.*

**40—Collateral facts.**

Question relating to collateral facts may be put to a witness for the purpose of discrediting his testimony and shewing his interest, motives and prejudices.

*See Criminal Law*, III. 7 *Reg. v. Charson.*

**41—Several crimes.**

Evidence of one crime may be given to shew a motive for committing another. *Ibid.*

**42—Depositions at Inquest—Receivable as statements**

Depositions made and signed by a party at an inquest may be received in evidence to contradict him whether the inquest was illegally taken or not, as being statements made on a previous occasion. *Ibid.*

**43—Previous statements—Variance.**

A witness may be asked on cross-examination, if he has not previously made a statement at variance with his evidence on the trial; but in order to do this, the witness's attention must be called to the particular statement by which it is proposed to contradict him, and he cannot be asked generally to relate a conversation with another person in order to enable the cross-examining counsel to discover whether any of his statements vary from his evidence on the trial. *Regina v. Mailloux, et al.* 3 *Pug.* 493.

**Evidence in cross-examination instead of as rebutting not ground for new trial.**

Evidence put in on cross-examination by plaintiff of defendant's witness instead of rebutting testimony, not a ground for new trial. *Godard v. Fred. Boom Co.* 6 *All.* 448.



## IX.

## COMMISSION—INTERROGATORIES—DEPOSITION.

**1—Deposition taken abroad—Presumption that oath rightly taken.**

Depositions taken abroad under a Commission issued pursuant to the Act Wm. IV. cap. 84, and returned with the commission, are admissible in evidence without proof that the commissioners had taken the oath prescribed by the commission, or return by them to that effect. Such oath is required to be taken, but the Court will presume that this has been done, nothing appearing to the contrary. *Wilmut v. Haws*, 1 *Kerr* 351.

**2—Papers, annexing of—Commission.**

Papers enclosed and returned with a commission to examine witnesses, and referred to by the witnesses, need not be annexed to the depositions, if sufficiently identified. It will be presumed that a commission-produced in Court is in the same state as it came from the Commissioners, and that the exhibits enclosed are those referred to in the depositions. *Lawton v. Tarratt*, 4 *All.* 1.

**3**———As a general rule, where evidence is taken under a commission, and documents are proved, such documents should be returned enclosed with the commission. There may be exceptions where the document cannot by law be removed from its place of custody; in such case, an office copy, or an examined copy, should be returned with the commission. *Thompson v. Reed*, 5 *All.* 7.

**4**———If there is clear evidence to identify papers as those referred to in the depositions taken by the Commissioners, they may be received in evidence, though not returned with the depositions. *Ibid.*

**5**———The mere proof of the handwriting of one of the Commissioners upon a paper purporting to have been referred to in the depositions, is not sufficient evidence of identity. *Ibid.*

**6—Second commission to examine same witness.**

Where a commission to examine a witness abroad has been executed and returned, another commission to examine the same witness on matters not gone into on the first commission, can only be granted under very peculiar circumstances, and the necessity of it must be clearly shewn by affidavit. The second commission shoud be limited in its terms. *Light v. Abel, East. T. 1865.*

**7—Addressing to Court—Sufficiency.**

The depositions of a witness taken *de bene esse* under the Act 5 Wm. IV. cap. 34, sealed and up and indorsed "in the Supreme Court," with the title of the cause, the date and the commissioner's name are sufficiently addressed to the Court within the meaning of the Act, to be receivable in evidence. *Waterhouse v. Marine Assurance Company, 3 Kerr 689.*

**8—Commission addressed to several—Execution by part—Waiver.**

Where a commission for the examination of witnesses abroad was issued directing the depositions to be taken before four Commissioners, one of whom, though notified, did not attend, and the commission was executed by the other three, in the absence of any protest at the time, or suggestion that defendant had been injured by its execution by three only, and where he had an opportunity of applying at term to suppress the depositions, the Court held that the objection was waived, and it was too late to object to their reception in evidence at the trial. *Gilbert v. Campbell, 1 Han. 471.*

**9—Wrong entitling—Misnomer.**

A commission issued out of the Supreme Court of this Province for the examination of a witness in Ireland, in which the plaintiffs were named "Hugh James and Heatley W. his wife," the depositions returned with the commission were entitled "In the Supreme Court, Nova Scotia," and the plaintiff's wife was called "Heatley Ann" in the title of the cause.—*Held, That the depositions could not be received in evidence. Doe dem. James v. Mr. Lauchlin, 5 All. 54.*

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**10—Commission to two Commissioners—Opening commission—Return of same—Absence of Witnesses.**

Where a commission issues to two commissioners for the examination of witnesses, and some evidence is properly taken before both, one commissioner may return the commission, and is not bound to wait an indefinite time to permit other witnesses to be examined.

A Judge has no power, without consent of parties, to open the commission before the jury are sworn.

It is not necessary before putting in depositions to prove that the witnesses are out of the Province, having been shewn to be out of the Province when their evidence was taken, it will be presumed they continued so, unless contrary shewn.

Plaintiff is not bound to read defendants evidence taken under commission, but only the evidence which he himself gave before commissioners. *Burpee v. Carrill et al* Pug. 141.

**11—Seal of Commissioners—presumption as to.**

Where depositions taken under a commission are returned to the court enclosed in an envelope, addressed as directed by the Consol. Stat., cap. 37, sec. 134 and sealed up, it will be presumed that the seal is that of the Commissioner who took the deposition. *Doe dem. Heathcote v. Hughes*, 2 P & B 296.

**12—Absence of Witness—Sufficiency of Evidence of.**

Where a commission to examine witnesses in England had been prepared and sent by the plaintiff's attorney, who had acted as the attorney for and corresponded for several years with one of the deponents examined, addressing letters to him at London, and receiving replies, and never knew him or the other deponents named in the commission to be in this province and knew nothing of the latter except from having seen their names on documents in his possession relating to this suit, *Held*, Sufficient evidence of the several deponents being absent from the province to warrant their depositions being read in evidence. *Ibid*.

## X.

## ADMISSION FROM PLEADING.

**1—Admission by Plaintiff's Counsel.**

Defendant may avail himself of a fact which is admitted by the plaintiff in his opening, and made part of the plaintiff's case, although as the pleadings stood the defendant could not have given evidence of such fact. *Wallace v. Vernon*, 1 Kerr 5.

**2—Different Pleas.**

*Seemle*, An admission on one plea does not qualify the issue joined on another distinct plea, nor affect the recovery on the latter issue. *Kinnear v. Gallagher*, 1 Kerr 424.

**3—Reference to description of lot in declaration—Plea—Plan.**

Description of lots in plan of city of St. John, plea not guilty in so far as relates to the said close described by number, and as mentioned in declaration in specific count. *Held*, That the reference in plea to the said close being specific and plain, the plea incorporated the description as far as it related to the lot in question, and was an admission of the identity of the lot on the face of the plea; that further proof was unnecessary, and that reference to plan was surplusage. *Merritt v. Coxeter*, 2 Kerr 385. See Trespass II. 19, same case.

**4—Intestate's goods—Allegation.**

An allegation in the assignment of a breach, that goods and chattels came to the hands of defendant as administrator, necessarily shows that they were the goods of the intestate. *Sherlock v. McGee*, 1 All.<sup>2</sup> 346.

**5—Execution of Lease.**

In an action against the assignee of a lease made by the plaintiff to A., the defendant pleaded that it was not the deed of A. *Held*, That the execution of the lease by the plaintiff was admitted by the pleadings. *New Brunswick and Nova Scotia Land Co., v. Kirk*, 1 All. 443.

**6—Replevin—Replication, property in plaintiff—Plea admitting property in custody of law.**

See Pleading II. 30.

**7—Corporation sued as such—Appearing and pleading—Estopped from disputing existence as body corporate.**

See Estoppel I. 4.

**8—Demurrer—Plea—Leave to amend.**

Where a cause has been set down for argument on demurrer to a plea, and the defendant obtains leave to amend on payment of costs, he thereby admits the plea is bad. See *Howe v. Carson* 3 Kerr 11 1.

**9—Payment of money into Court.**

Payment of money into Court generally, in a declaration containing a count on a promissory note, and the common counts does not prevent the defendant from disputing the consideration of the note. *McCann v. Riley*, 3 All. 154.

**10—**Payment of money into Court in an action of *indebitatus assumpsit*, only admits a cause of action to the amount paid, but has no other effect. *Anderson v. Allison*, 3 All. 173.

**11—**In *indebitatus assumpsit* on the summary side of the Court, for goods sold and delivered, and for the hire of a warp and buoy rope, the particulars to the writ were £10 for a warp sold, and £2 for the hire of an anchor and rope; the defendant paid £3 into Court generally, and the only contract proved on the trial was one for the hire of a warp. On verdict for the plaintiff for £7, and rule *nisi* to set it aside—*Held*, That the payment of money into Court only amounted to an admission that the defendant was liable in respect to some contract to the amount of the money so paid in; and that it was incumbent on the plaintiff to shew not only that a larger sum was due, but that a contract existed in respect of which the defendant was liable beyond the amount so paid into Court, and that the case was

not altered by the Act of Assembly 4 Wm. IV, cap. 41, sec. 2, relating to particulars in summary actions, and a new trial was accordingly granted. *Taylor v. Barker*, 3 Kerr, 614.

**12**——The declaration stated that the defendant was indebted to the plaintiff in £1,000 for the salvage of "a certain ship," by the plaintiff's vessel before then saved, and delivered to the defendant; and in the further sum of £1,000 for work and labor of the plaintiff, done and performed with his steamer in and about the defendant's business, and at his request; there was also a common count for work and labor. The defendant paid £15 into Court on the declaration generally. *Held*, That this did not admit any contract for salvage beyond the amount paid, as the contract set out in the declaration was not specifically for salvage of any particular ship, but applied to more than one transaction. Where a specific contract is declared on, payment of money into Court admits that contract; but where a contract is set out which may apply to more than one transaction, payment only admits a contract to the extent of the amount paid. *Walker v. Pendleton*, 5 All. 408.

#### **Offer to confess Judgment.**

*See* Judgment II. 4.

#### **13—Special Contract—Judgment by default.**

Where a special contract is set out in the declaration, and the plaintiffs obtain judgment by default, or on demurrer, the contract is admitted as stated in the declaration, and evidence which would have been admissible under the general issue will not be received on an enquiry to assess the damages. *McDonald et al. v. Cumming et al.* 2 Pug. 282.

### **XI.**

#### **MISCELLANEOUS.**

##### **1—Authority of Officer—Proof—Affidavit on Sheriff's Deed by Deputy.**

Where the affidavit indorsed on a Sheriff's deed of land sold under execution, as to the regularity of the proceed-

ings, pursuant to the Act 4 Wm. IV, cap. 22, appears to have been made by the Deputy Sheriff—*Held* that the authority of such Deputy may be proved by evidence of his acting in that capacity, although his appointment was under a written deputation, which is not produced. *Doe dem Barlow v. Hatfield*, 1 Kerr 417.

**2—Surveyor-General—Notice signed in official character—Authority.**

*See* Crown Grant I, 18.

**3—**Assignment of Mortgage by an Executor is not admissible in evidence without proof of Probate. *See Doe v. Hansov*, 3 All. 427.

**4—Consideration—Evidence to explain.**

*See* Consideration 8.

**5—Objection after admission of evidence.**

A deed was put in evidence without objection as a registered deed, but was afterwards discovered not to have been duly acknowledged, whereupon the defendant's counsel objected in his address to the jury, that it did not give livery of seisin. *Semble*, That the objection was not too late; but that in such case the Judge might allow the opposite party to give evidence of livery of seisin. *Scribner v. McLaughlin*, 1 All. 379.

**6—Tender of Evidence.**

The expression of wrong opinion of Judge on effect of evidence offered, upon which counsel withdraws it, is not a ground for new trial, the evidence should be distinctly tendered. *Ruel v. McElroy*, 3 All. 212.

**7—**Evidence offered to show a statement made by a deceased witness in giving evidence on a former trial in the hearing of plaintiff in the present suit, rejected.

*Quere*, Whether other evidence than appears on Judge's notes could be given; if it could, it should be distinctly tendered on that ground. *Prescott v Walton*, 2 Han. 230.

**8**——Evidence rejected at a certain stage of cause, but not absolutely, and not again tendered, is no ground for new trial. *Tufts v. Hatheway*, 4 *All.* 62.

**9**——When evidence is tendered, the Judge has a right to ask the particular purpose for which it is offered, and if the counsel refuses to state it, he may reject it. *Key v. Thomson*, 1 *Han.* 297.

**10—Judge admitting evidence at any time during trial.**

*See Supra VIII. 11.*

**11—Improper admission of evidence—Withdrawal.**

Though improper evidence of damage has been given, if it has been expressly withdrawn by the Judge from the consideration of the jury, and by subsequent evidence in the cause, it becomes immaterial; the Court will not disturb the verdict on the ground of its improper admission. *Spurr v. Albert Mining Co., East. T.* 1871.

**12—Surveyor—Reference to plan—Loss of field notes.**

A surveyor who had made a survey of land by direction of the Government, may refer to a plan of it made by himself shortly after the survey filed in the Crown Land office, and upon which survey a grant of the land issued, for the purpose of enabling him to state the courses and distances which he run, his field notes of the survey having been lost. *Niles v. Burke*, 1 *Puq.* 237.

**13—Debits and credits—Accounts containing.**

One side only of an account containing debits and credits cannot be given in evidence; but it is competent for the party to whom the account has been rendered, to put it in evidence and disprove the debits. *Palmer v. Gilbert*, 1 *All.* 505.

**14—Promissory Note—Evidence under Common Counts.**

*See Bills and Notes*, VI. 12.

*Assumpsit III. a.*



**15—Feigned Issue—Evidence under.**

*See Practice XII.*

**16—Handwriting—Proof of—Comparison.**

The defendant's signature to a disputed note was proved on a former trial by comparing it with the signature to a bond which he had signed. The witness who proved this, had since died, and on the second trial his testimony was read from the Judge's notes, and evidence given of the defendant's signature to the note in dispute, by comparing it with the signature to a bond shewn to the witness. *Held*, That without proof to identify this as the bond proved at the first trial, or that the defendant's signature was genuine, the evidence was improperly admitted. *Palmer v. Wilbur*, 8 *All.* 448.

**17**———A witness who once had in his possession, a promissory note acknowledged by the defendant to have been signed by him, is competent to prove the defendant's handwriting, though his only means of the knowledge of it is the signature to the note formerly in his possession. *Petterson v. Gillis*, *East. T.* 1881.

**18—Onus probandi — Timber cut without license—Crown land.**

Where timber is seized by the Crown as being liable to forfeiture under the Acts of Parliament 8 Geo. I, cap. 12, and 2 Geo. II. cap. 35, for being cut without license, and is claimed on the ground that it was not cut on the property of the Crown; the *onus* of proving that it was cut on private property, is on the claimant. *Regina v. Beveridge*, 1 *Kerr* 58.

**19—Selling Liquor.**

In a prosecution for a penalty for selling liquor without license, proof that the sale was made by a person in the defendant's shop in his absence and without shewing any general or special employment of such person by the defendant in the sale of liquors, is sufficient *prima facie* evidence against him. The prosecutor need not prove that the defendant had no license. *Ex parte Parks*, 3 *All.* 237.

**20—Onus probandi.**

The *onus* of proving that liquor was not intended for sale, in order to save it from forfeiture under section 15 of 18 Vic. cap. 36, is thrown on the owner. *Reg v. Salter*, 3 All. 321.

**In action of replevin.**

*See* Replevin.

Pleading II. 27, 30.

**21—Attesting witness—Diligence in discovering.**

Whether due diligence has been used in discovering attesting witness must depend on the circumstances of each case. *See Crane v. Ayre*, 2 All. 577.

**22—Relevancy—Bill of Sale—Subsequent burning of house.**

Where the question in issue was whether the plaintiff had fraudulently set fire to a house in which he lived, evidence that he had given a bill of sale of his furniture, and subsequently insured it and claimed the insurance after the fire, is relevant, being an act of the plaintiff tending to shew a motive for the destruction of the house. *Whelon v. Wetmore*, 3 All. 482.

The bill of sale was altered in a material part after execution. *Held*, That it was not thereby void from the beginning, but was admissible to prove that the plaintiff had sold the furniture. *Ibid*.

**22 a—Damage of land—Irrelevant questions.**

In an action for overflowing plaintiff's land by means of a mill-dam, and thereby destroying his growing trees, the plaintiff cannot be asked for what purpose he purchased the land, or how much he paid for it, such evidence being irrelevant to the question of damages. *Lowell v. McAdam*, 1 Pug. 337.

**23—Admissibility of evidence under plea—Lateness of objection—Waiver.**

In trespass for impounding cattle, the defendant

pleaded "not guilty," and at the trial his counsel opened a defence, justifying impounding the cattle *damage feasant* and examined several witnesses to prove it, and the plaintiff's counsel then objected that the evidence was not admissible under the plea; but further evidence was received, and the defendant obtained a verdict. The Court refused a new trial on the ground of the improper admission of the evidence, the damage, if any, being very small.

*Quere*, Whether the plaintiff had not waived the objection, by not taking it before the defendant gave any evidence of justification. *Campbell v. Wheeler*, 1 *Han.* 269.

#### **24—Defective title deeds**

May be used to shew extent of claim of possession. *See Trespass II.* 28.

#### **25—Usage—Rebutting proof of.**

*See Contract* 2.

#### **26—Nuisance—Erection of steam mill.**

Evidence of adjoining residents as to the injurious effects of steam mill upon them, admissible. *See Barlow v. Kinnear*, 2 *Kerr* 94.

#### **27—Mining—Injurious effects on adjoining soil.**

Evidence of the injurious effects of mining coal on other lands in the neighbourhood of the plaintiffs, is properly received. *See McMahon v. Berton*, 2 *All.* 321.

#### **28—Witness not remembering statements.**

When a witness called by the plaintiff to prove a payment, says that he does not remember any statement made by the defendant at the time, explaining the payment, it is competent for the defendant to call evidence for that purpose. *Flaglor v. Richards* 1 *All.* 514.

#### **29—Agreement not affecting prima facie case—Non-production—Contract partly written, partly oral.**

Contract partly written and partly parol, the plaintiff making out a *prima facie* case of possession of lumber, it

is unnecessary to produce an agreement in writing relating to matter of suit, but not affecting the *prima facie* case. When a contract is to be made out partly by written documents and partly by parol evidence, the whole becomes a question for the jury. *Macpherson v. Fredericton Boom Company*, 1 *Han.* 337.

**30—Conflicting statements—Application to compel Sheriff to pay over money—Non-production of receipt.**

An application was made on behalf of B. to compel the Sheriff to pay over a sum of money deposited by him in lieu of bail in certain suits in which S. was arrested, but in which he had since been rendered. B.'s affidavit set forth that the Sheriff agreed, when the money was deposited, to return it if S. was rendered. This statement Sheriff denied, alleging that he gave a receipt to B., and that the creditors of S., who were proceeding against him, under Absconding Debtors' Act, claimed the money as the property of S. *Held*, That the receipt not being produced, and the evidence being conflicting, the Court would not grant the application. *Oulton v. Scovil*, 1 *Han.* 498.

**31—Winding up act—Judge's order.**

A Judge's order settling list of contributories, only *prima facie* evidence of liability. *See McKenzie, Curator, etc. v. Seaman* 1 *Han.* 621.

**32—Debit on Books.**

*See Credit.*

**33—Credit—Contracting as Agent—Judgment by default—Inquiry.**

After judgment by default in an action on the common counts for work and labour, etc., the defendant, on the execution of a writ of inquiry, may shew that he contracted merely as the agent of a third person to whom the credit was given. *See Falls v. Sargent*, 3 *Kerr* 248.

**34—Serving paper—Making evidence.**

A party cannot make evidence for himself by serving an account on the opposite party. *See Gilbert v. Palmer*, 1 *Han.* 667.

Nor by writing letters. *See do.*, 1 *Han.* 471.

**34a—Registered deed—Delivery to, or assent of grantee must be shewn.**

To an action for the breach of a written contract, whereby B., in consideration of £500 paid by him to A., agreed to convey to A. a mill and mill privilege at P. as soon as he obtained a grant thereof. B. pleaded—1st. *Non assumpsit*; 2ndly. That he executed and delivered a conveyance to A.; and 3rdly. That a conveyance was tendered and refused. At the trial a registered deed was offered in evidence under the pleas without proof by the subscribing witness of the execution in the ordinary way. *Held*, That such evidence was properly rejected, it not being competent for the grantor to make a deed evidence by mere force of the registry and acknowledgment, without delivery to, or assent of the grantee. *Smith v. Millidge*, 2 *Kerr* 408.

**35—Shewing fraud in obtaining Judgment.**

Evidence of fraud in obtaining a judgment by the plaintiff against A. is admissible at *Nisi Prius*, where the plaintiff claimed title under a sale on execution issued on such judgment, and was party to the fraud; the defendant being also a judgment creditor of A., and having purchased under an execution issued after the plaintiff's execution. *McKay v. Crocker*, 5 *All.* 20.

**36**——Plaintiff and defendant had both obtained judgments against A., and issued executions thereon, but the plaintiff's execution was first in the Sheriff's hands; the Sheriff sold under both, and the plaintiff purchased under defendant's protest, at the sale on his execution, and the defendant purchased the same property under the sale on his execution. *Held*, That the defendant had a right in

an action of trover brought against him by the plaintiff (the property being in the defendant's possession) to shew fraud in the plaintiff in obtaining his judgment against A. *Ibid.*

**37—Disclosure of Writing—Formation of Association.**

Defendants were the committee of an Association who employed M. to publish a newspaper under a written agreement which prohibited him from pledging the credit or creating any liability against them. Plaintiff acted as reporter for the paper, but proved an agreement with the members of the Association, having been referred by them to M. for the financial arrangements. In an action against the Committee for work as Reporter, one of the defendants on cross-examination stated, that there was a writing under which the Association was formed previous to the agreement with M. *Held*, That the writing was properly admitted in evidence on the part of the defendants, 1st. Because the plaintiff had shewn by the agreement he put in, that the defendants represented an Association; and 2nd. Because he had shewn by the cross-examination that there was a writing previous to the agreement out of which it grew, and it was therefore competent for the defendants to shew the origin of the Association. *Beardsley v. Scovil*, 6 All. 86.

**38—Statement of belief—Previous Statements—Effect.**

On the trial of an indictment for burning a barn, a witness for the prosecution stated that he had examined foot tracks in the snow leading from the barn to the prisoner's house, that they were double tracks, and appeared as if the person had gone and returned on the same track. On cross-examination, he stated that it appeared to be a double track going and coming, but he could not state positively as the snow was mealy in the bottom, and he could not see distinctly; and on re-examination he said he believed the tracks each way were the same tracks. *Held*, That the statement of the witness' belief did not make his evidence on this point inadmissible, but that the effect of it was properly left to the jury.—*Regina v. Foley*, East T. 1873.

**39—Damage—General assertion insufficient.**

A plaintiff giving evidence on his own behalf cannot be allowed to state that he has sustained a certain amount of damage by the act of the defendant : he should state the facts on which he relies to prove his damages, from which the jury are to determine the amount. *Domville v. Keeran, East. T.* 1871, and *Ryan v. James*, 1 *Pug.* 122.

**40—Letter—By whom written—Sufficiency of evidence as to.**

Where plaintiff sent defendant a letter received by him from D. C. & Co., to shew that certain property claimed by him from defendant belonged to him, and at the same time wrote defendant, making claim to the property ; and defendant answered plaintiff's letter, returning the letter from D. C. & Co. and stating at the bottom " We enclose D. C. & Co.'s letter to you."—*Held*, per Allen, C. J. and Fisher J., Welden J. dissenting, That this was a sufficient admission by defendant that the letter was written by D. C. & Co., to authorize its admission in evidence. *Domville v. Ferguson*, 1 *P. & B.* 40.

**41—Conversation—Communication as to contents of telegram.**

At defendant's request plaintiff telegraphed to D. C. & Co. that defendant refused to deliver to him a quantity of iron claimed by plaintiff, to which an answer came to defendant and plaintiff swore on the trial that either defendant or A. his clerk told him what the answer was ; that defendant also told him that he was not bound to deliver the iron on a telegram, and would not do so. A. denied having told plaintiff the contents of the telegram. *Held*, per Allen C. J. and Fisher J., Welden J. dissenting, That the conversation with defendant was enough to identify him with the communication of the answer to plaintiff, and that plaintiff's evidence of the contents of the telegram was properly received. *Ibid.*

**42—Witness's testimony on previous trial—Admissibility of when too ill to be examined—Identity**

In a replevin suit brought by the present plaintiff

against K. for the alleged wrongful detention of a quantity of iron, F. was sworn and gave evidence. In that action K. was claiming under F. as his servant, and F. was in fact the real defendant. Subsequently the plaintiff sued F. for damages for the same wrongful detention of the iron in question, and F. being too ill to be examined, his testimony in the former action against K. was offered in evidence and rejected. *Semble*, improperly so. *Ibid*.

**43—Contract—Evidence tending to affect—Not admissible.**

Where molasses were sold according to a certain gauge, and no liability on party, defendant was shewn to make good any deficiency, evidence to shew that the molasses fell short on re-sale was properly rejected. *McLean v. Robinson*, 2 P. & B. 88.

**44—Irrelevant testimony.**

Where evidence when offered is irrelevant and can only become material by the giving of subsequent testimony, it is discretionary with the Judge whether to receive it or not. *Davidson v. King*, 3 Pug. 396.

**45—General statement of value of goods by plaintiff—No withholding of evidence of value by defendant.**

A statement of the plaintiff on the trial that she should judge that a case of goods contained from \$400 to \$500 worth of goods from the knowledge of buying and selling like goods was held to be improperly admitted in evidence the defendants not keeping back any evidence in their power to produce. *Smith v. Lunt*, 2 Pug. 64.

**46—Loss of goods—Proof of what contained in case of goods—Damages.**

In an action against a common carrier for the loss of a case of goods, a jury is not justified in giving a verdict for greater damages than the value of goods actually proved to have been contained in the case, and the maxim, *omnia presumunter contra spoliatores* will not apply unless



it is shewn that the goods were in the defendant's possession, and that they had an opportunity but omitted to shew their value. *Ibid.*

**47—Deed—Witness.**

A conveyance of land does not require a witness. *Doe dem. Sherlock v. Powers*, 6 *All.* 232.

**48—Incorporation of Company.**

In an action brought by plaintiffs in their corporate name against defendants as endorsers of a promissory note, the defendants pleaded no endorsement and want of presentment. *Held*, That under these issues the plaintiffs were not bound on the trial to prove their incorporation. *Bank of Nova Scotia v. Morrow*, 2 *Pug.* 460.

**49—Action against charterers of vessel—Damages—Reduction.**

In an action against charterers of a vessel for non-delivery of goods shipped under a bill of lading, if defendant claims that the damages should be reduced by a claim for general average, the burthen is on him to establish the liability and shew the amount. *Burpee v. Carville*, 3 *Pug.* 141.

**50—Comparison of Charts—Improper admission of Evidence.**

Where a sailing chart was put in evidence, and witness asked on cross-examination in what respect it differed from another on board the defendant's vessel. *Held*, that this evidence was improperly admitted. *Jackson v. McLellan*, 2 *Pug.* 83.

**51—**Where improper evidence is put in by Counsel contrary to the opinion of the Judge presiding, the court will not undertake to say it had no influence with the jury, and will grant a new trial. *Ibid.*

**52—Lunatic.**

Evidence should be given before two Justices acting

together, and it is not sufficient that an affidavit be made before one and shewn to the other under 1 Rev. Stat. cap. 89. (Consolidated Stat. cap. 22.) *McGuirk v. Richard*, 2 *Pug.* 240.

**53—Chairman of Corporation—Proof of being such.**

Evidence that a person communicated with a corporation as chairman of the trustees of the corporation, without shewing in what way or how often he so communicated, is not sufficient proof of his being such chairman. *Regina v. Sullivan*, 3 *Pug.* 464.

**54—Complainant before Justice—Statements.**

Complainant's statements before Justice of Peace. Evidence may be given of what was said when the complaint was made. *Gidney and wife v. Dibblee*, 2 *Pug.* 388.

**Receipt by Justice of Peace—insufficiency of evidence of settlement to render him liable for sum paid.**

*See* Justice of Peace III. 5.

**Public Records—Clerk of peace not bound to produce the records of Sessions upon a subpoena duces tecum.**

*See* Justice of Peace, III. 8. *Wetmore v. Harding*.

**Account Stated—Evidence.**

*See* Assumpsit III. A.

**Will—Certified copy cannot be given in evidence in questions affecting real property.**

*See* Will. *Knapp v. King*.

**Evidence pressed in on trial against opinion of Judge.**

*See* New Trial, III. 57.

**Execution of will—Attestation—Marksmen.**

*See* Will. *Re Hanlan*.

**Presumption against will bearing self-evident marks of being unfinished.**

*See* Will. *Re Gilbert*.

**Corporate name—Proof of incorporation when not required.**

*See* Pleading, IV. 12.

**Warranty of fitness of premises for purposes intended.**

*See* Warranty.

**Letters referred to in defendant's answer in Equity—Use of same.**

*See* Insolvent Act. *McLeod v. McLeod*.

**Latent Ambiguity—Intention.**

*See* Release.

**Replevin—Plea non cepit—Evidence under.**

*See* Pleading II. 28.

**Proving property.**

*See* Pleading II. 29.

**Trespass—Place not proved—Sufficiency of evidence to entitle plaintiff to recover on asportavit count**

*See* Trespass I. 25.

**Place properly described—Reference to original grant—Correspondence in proof—Evidence of plan in Clerk's office not essential.**

*See* *Merritt v. Coxeter*, 2 Kerr 385. (*See* same case, *Supra* X. 3.)

**Mesne profits—Action for—Husband and wife—Judgment against wife—Action against husband and wife for joint trespass not supported by proof of judgment against wife before marriage—Marriage not being averred.**

*See* Ejectment VI.

**Confessions of third persons—Proof of felony.**

*See* Criminal Law.

**Res Gestæ—Sheriff's deed received in evidence as forming part of res gestæ in action of ejectment, without proof of judgment or execution to warrant it.**

*See* *Doe v. Baxter*, 4 All. 131.

## XII.

## QUESTIONS OF FACT PROPER FOR DECISION OF JURY.

**Disseisin.**

Disseisin is a question of fact for the jury to decide; and if on a trial in ejectment a verdict is taken for the plaintiff by consent, subject to a motion for non-suit, on the ground that the party through whom the plaintiff derives title was disseised at the time he conveyed to the plaintiff; the Court will not decide the question, but send the case down to a jury. *Doe dem. Dowling v. Pearson*, 135.

**Accord and satisfaction—Whether bill taken as such.**

Whether or not a bill or note is taken in discharge, and satisfaction of a pre-existing debt is a question for the jury, and where the jury was unable to say whether or not a draft or note was so taken in discharge and satisfaction, and a verdict was thereupon entered for the plaintiff, the Court sent the case down for a new trial. *Dunn et. al. v. Fredericton Boom Co.*, 1 P. & B. 575.

**Laches.**

*Quere*, Whether, where the creditor having received his debtor's draft on a third person in whose hands the debtor had funds, neglected to present the draft for acceptance and give to the defendant notice of non-acceptance, the jury should not have been directed that the creditor was guilty of such laches as to make the debt his own, and preclude him from recovering against the defendant. *Ibid*.

**Easement—Acquisition—Relinquishment, or Abandonment.**

*See* Easement 6.

**Fraud.**

*See* New Trial III. 29.

Fraud.

**Fraudulent Removal.**

*See* Distress.

Foreign Law *See*.

**Inference from Facts.**

*See Malicious Prosecution.*

**Nuisance—Effect of erection of Dam.**

*See Action on the case III. 1.*

**Partnership.**

*See Contract 15.*

**Possession (Adverse.)**

*See Limitation of Actions.*

**Trust Deed.**

*See Deed.*

*Insurance See.*

**Parties—Same Name—Intention**

*See Identity.*

*Surrender See.*

**Entering on land—Intention of party.**

*See Limitations (Stat. of) 12.*

**Credit to whom given.**

*See New Trial II. 45. Raymond v. Cumming.*

**Sufficiency of evidence as to after acquired property.**

*See Absconding Debtor 17. Cullen v. Voss.*

**Malice not a question for the Judge to determine.**

*See Malicious Prosecution 11.*

**XIII.****GENERAL ISSUE—EVIDENCE UNDER.****1—Sheriff.**

Neglecting to execute process may shew under general issue that debt was barred by Statute of Limitations. *See Curren v. Beckwith, 3 All. 365.*

**2—Acceptance; payable half cash, half goods—Tender of goods.**

In an action on an acceptance, payable half in cash and half in goods, a tender of the goods cannot be given in evidence under the general issue. *Turner v. Crane*, *Hil. T.* 1892.

**3—Trespass—Easement.**

An easement or privilege granted by deed to turn the water of a river for the use of mills, and to build mill-dams, does not convey the right of soil, and cannot be given in evidence under the general issue in trespass. *Wallace v. Milliken*, *East. T.* 1881.

**4—License—Digging land.**

In trespass for digging up the plaintiff's land, the defendant justified his entry under a license from a former owner of the land to work the mines therein. *Held*, That evidence of such license was not admissible under the general issue, either to justify the defendant's entry or to shew a previous possession in him. *Gesner v. Cairns*, 2 *All.* 595.

**5—Trespass quare cl. fr.**

The defendant may in trespass *quare clausum fregit*, under the general issue shew title in himself, or that he entered by direction or authority of the person having title. *Hamilton v. Holder*, 2 *Pug.* 222.

**Non-tenuit—Evidence under—Fraud may be shewn.**

*See* Landlord and Tenant VII. 7. *McLeod v. McGurk*.

**Pew—Joint occupation of.**

*See* Use and Occupation.

**Information for Intrusion.**

*See* Intrusion 1.

**Admissibility of evidence under—Objection not made in time.**

*See* Supra XI. 23.

**Plea when considered as traversing whole declaration.**

*See* Pleading II. 40. *Atkinson v. Desmond*.

**EXCEPTION.**

*See* Bail.  
Practice.  
Error.  
Crown Grant.

**EXCESSIVE DAMAGE.**

*See* Damages.

**EXCESSIVE DISTRESS.**

**See Distress—Necessary allegation in declaration.**

*See* Pleading I. 53.

**EXCHANGE.**

**Agreement for exchange of lands.**

*See* Deed V. 1.

**Agreement for exchange of Waggon—Warranty of ownership.**

*See* Warranty 4.

**EXCHEQUER.**

*See* Supreme Court.

1 ——— Where logs were seized as having been cut on Crown land without license, an order for their sale as “perishable articles” was refused; the only ground alleged being the expense of their custody pending the proceedings for condemnation. *Rex. v. 726 Saw Logs, Trin. T. 1838.*

2 ——— A summary action, in which the rights of the Crown are involved, may be removed into the Court of Exchequer by an order. *Wilson v. Briscoe, 2 All. 535.*

**EXECUTION.**

- I. FIERI FACIAS—LEVY.
- II. CAPIAS AD SATISFACIENDUM.
- III. SETTING ASIDE AND STAYING.
- IV. MISCELLANEOUS.

## I.

## FIERI FACIAS.

**Receivable in Evidence though not returned.**

See Evidence II. 20.

**1—Right to seize goods—Different County.**

Goods of a judgment debtor were sold and delivered to the plaintiff in the County of Carleton, and were afterwards brought into the County of York. *Held*, That the Sheriff of the County of York could not seize them under an execution subsequently issued against the debtor, though at the time of the delivery to the plaintiff there was an execution against the debtor in the same suit in the hands of the Sheriff of Carleton. *Connell v. Millar*, 1 *Kerr* 302.

**2—Binding Lands.**

A writ of *fieri facias de bonis et terris*, issued upon a judgment in a summary action binds the lands from the time of the delivery thereof to the Sheriff to be executed, and it is not necessary that any prior memorial of the judgment should be registered in the County records to prevent a conveyance, made by the judgment debtor of the land after the delivery of the *fi. fa.* to the Sheriff, taking precedence of the Sheriff's sale and conveyance. *Doe dem. Nesmith v. Williston*, 2 *Kerr* 459.

**3—Against estate of mortgagee in fee.**

The estate of a mortgagee in fee who has not taken possession of the land is not seizable in execution on a judgment against him. The fact of there being no bond or covenant to pay the money does not affect the question. *Doe v. White*, 4 *All.* 314.

**4—Delivery—Operation—Intention to levy.**

An execution put in the Sheriff's hands, with instructions not to levy on it unless it should become necessary to prevent another execution from taking precedence will not bind the goods of the defendant, nor defeat a purchase of them before a seizure actually made under the execution. *Crane v. Clark*, *Hil. T.* 1828.



5—Where a *fiery facias* issues, and there is no evidence of intention beyond the mere delivery of the writ to the Sheriff, it may be inferred that it was intended for immediate execution; but circumstances may be shewn which will negative this presumption, and tend to the inference that at the time the writ was delivered, it was not the intention of the judgment creditor that it should be executed without further instructions. A letter from the judgment creditor while an execution is in the Sheriff's hands, advising the debtor about the management of his business and the disposition of his property to raise money to pay his debts, is evidence of the intention of the creditor that the execution should not be put into immediate force. *Johnson v. Crocker*, 4 All. 94.

6—Where a *fiery facias* was delivered to the Sheriff for the purpose of binding the debtor's lands, and not for the purpose of a sale, and the Sheriff informed the debtor that he had the execution and indorsed upon it that he had levied on the lands, but did no other act for more than five years, when he advertised the land for sale. The Court, doubting whether this amounted to a levy on the land, set it aside on the application of the debtor and a mortgagee of his land. *Hamilton v. Bryson*, 1 Han. 618.

**7—Before judgment obtained.**

An execution placed in the Sheriff's hands before judgment, will be treated as fraudulent, and will be set aside at the instance of a judgment creditor of the defendant. For the purpose of Justice, the Court will take notice of the particular time of a day when certain proceedings took place. *DeVeber v. Colling*, Hil. T. 1834.

**Miscalling Writ in Sheriff's Deed.**

*See Sheriff's Deed 1.*

**8—Levy under.**

Where an execution is correct in itself, though indorsed to levy more than the amount due, the Court will allow the levy to stand for the sum really due, if there is no fraud in the transaction. *See Lunt v. Estabrooks*, 3 Kerr 144.

9—The Sheriff need not make an actual entry on the land to levy: the advertisement is proof of the levy. *See Doe v. Hazen*, 3 All. 87.

10—An actual levy is not necessary. Where, after an execution had been delivered to the Sheriff, the defendant gave a written acknowledgment that a levy had been made on his property under the execution, and afterwards paid the amount to the Sheriff—*Held*, That the Sheriff was entitled to poundage on the amount paid, under 1 Rev. Stat. cap. 163. *Central Bank v. McKeen*, 5 All. 529.

**11—Sale—No actual seizure or overt act by Sheriff.**

The property of a judgment debtor in goods is not divested by a sale by the Sheriff, unless there has been some overt act of seizure by him, such as marking or taking possession of them or separating them from others. The sheriff must have done some act to enable him to deliver possession of the property to the purchaser, and he cannot by a general sale of all a debtor's goods, pass the title to property not in his view, and on which he has made no actual levy. *Reynolds v. Ayre*, 5 All. 333.

**12—Retaining money—Other execution.**

The Court will not order the Sheriff to retain in his hands money which he has levied on an execution at the suit of the plaintiff, in order to satisfy an execution against the plaintiff at the suit of one of the defendants in the Sheriff's hands at the same time. *Bradley v. Hopley, Hil. T.* 1828.

**13—Second execution—Satisfaction out of proceeds of first—Sheriff's right.**

If a second execution comes into the Sheriff's hands after he has sold under a former one, he has no right to to apply any money remaining in his hands after satisfying the first execution, towards the second one. *Stevenson v. Douglas*, Ber. 281.

**14—Teste—Issue.**

An execution tested on the day it is issued in vacation

upon a judgment entered up as of the preceding term, although irregular, is not a nullity since the Act 5 Wm. IV. cap. 37. (Chipman, C. J., *dubitante*.) *Power v. Johnston*, 2 Kerr 48.

See Acts of Assembly 21 Vic. cap. 20.

**15—Sheriff's Return—Uncertainty.**

A return of a Sheriff to a writ of *fi. fa.* that he had "taken from the defendant a horse claimed by the defendant's son, and placed it in charge of H., from whose custody he said it was stolen; and that nothing else was found with the defendant," is bad for uncertainty. *Ketchum v. Museroll*, 3 All. 347.

**Amending Return—Wrong Levy.**

See Amendment II.

**16—Variance between *fi. fa.* and the judgment amount—Sale not affected thereby.**

See Variance, *Linton v. Wilson*.

**17—Irregularity—Purchaser.**

Any irregularity in issuing the *venditione exponas* will not affect a purchaser under the Sheriff's deed.

See *doe dem. Hazen v. Hazen* 3 All. 87.

**18—Fieri Facias may issue after escape of debtor.**

See *Kelly v. Wilson*, 2 All. 475.

**19—Alteration.**

An execution which has been in the hands of the Sheriff, and was by him returned to the plaintiff's attorney, who altered it into an *alias*, and re-issued it, is void. *Johnston, v. Winslow*, Ber. 58.

**20—Levy, what amounts to—Estoppel.**

P., Sheriff of Queen's County, went to B.'s residence to execute a writ. B. gave him a description of the property on the place, and P. made a memorandum of it in B.'s

presence, and told B. that he (P.) had levied upon the property, and B. then promised that if the Sheriff would leave the property in the place, it should be forthcoming when it was required to be sold. *Held*, (by Allen, C. J., and Weldon, J.,) That B. was estopped by his conduct from saying there was no levy, as the Sheriff would certainly be estopped as against B. from saying there was no seizure. *Held*, (by Fisher and Wetmore, J. J.,) That the writ had been virtually executed, and that there was in substance an actual delivery. *Brooks and wife v. Palmer*, 1 P. & B. 615.

#### **21—Time of delivery of execution—Fraction of a day.**

A fraction of a day will not be considered with reference to the time of the signing judgment and issuing execution ; therefore, where an execution was delivered to the sheriff before the judgment was actually signed, but on the same day that it was signed, it was held regular. *St. Stephen Bank v. N. B. & Can. Ry. & Land Co.* 5 All. 629. See *Supra* No. 7. *Deveber v. Colling*.

## **II.**

### **CAPIAS AD SATISFACIENDUM.**

#### **1—Issuing second ca. sa.**

If no original execution issued within a year and a day after judgment is found on file, a second *ca. sa.* is not warranted, without a *scire facias* to revive the judgment. *Brown v. Partelow*, 3 Kerr 324. (See Rev. Stat., extending time, 12 Vic. cap. 39, sec. 35.)

#### **2—Amendment of.**

An application to amend a *ca. sa.* issued sixteen years ago will not be granted unless the writ is found on file, or some record of it is produced. *Quære*, Whether such an amendment would be made after such a lapse of time, and after the defendant had been arrested on a second execution, which was also irregular. *Brown v. Partelow*, 3 Kerr 324.

**3—Testatum.**

The want of an original *ca. sa.* in the County where the venue is laid, if not amended, is a valid objection to arrest under a *testatum ca. sa.* *Sewell v. Burpee*, 3 Kerr 368.

**4—Irregularity—Difference between judgment.**

*Ca. Sa.* differing in amount only from the judgment upon which it is issued, is not void, but only irregular. *Spence v. Stuart*, Ber. 219.

**Bail, pleading that no *ca. sa.* issued against principal—Application to Court to set aside proceedings for irregularity.**

*See* Bail 19.

**5—Defendant permitted to go at large by special bailiff of plaintiff.**

If a defendant in custody upon a *ca sa.* is permitted to go at large by a special bailiff named by the plaintiff to execute the writ, and his servant and agent, for that purpose, he cannot afterwards be re-taken on a new *ca sa.* These facts will be a good defence to an action on the limit bond given on the second arrest. *Andrews v. Dowdall*, Trin. T. 1882.

## III.

## SETTING ASIDE EXECUTION.

**1—Suspending—Staying—If not warranted by the judgment will be set aside—Debt—Execution in assumpsit.**

*See* Practice VI. 3.

**2—Second execution for balance—Recital.**

If a part of a debt has been levied, the execution should be returned and filed before a second execution issues for the balance, and the latter execution should recite the former levy, or it will be set aside for irregularity. *Smith v. Jones*, 2 All. 176.

3———A Judge of Common Pleas has power to set aside an execution irregularly issued, upon a judgment in that Court. *Wilson v. Street*, 3 All. 80.

#### **Suspending Remedy.**

*See Judgment.*

#### **4—Staying execution—Administrator—Estate insolvent.**

The Court will stay an execution on a judgment duly obtained against an administrator for the full amount of a debt due by his intestate, upon affidavits shewing the estate to be insolvent, and that the plaintiff will, if such execution issues, obtain an undue share of the assets of the estate. *Cunliffe v. Morehouse*, 2 Kerr 347.

### IV.

#### MISCELLANEOUS.

#### **1—Unsatisfied execution—Right to issue for balance.**

Where a Sheriff, having a *ca. sa.* against a defendant, received from him a horse in full satisfaction of the execution, without any authority from the plaintiff; and several months afterwards sent the horse to the plaintiff, who sold it to the best advantage, though for much less than the value agreed upon between the Sheriff and defendant. *Held*, That the Sheriff had no authority by law to receive the horse, and that it was no satisfaction of the judgment, although the horse might have produced enough to pay the amount due if the Sheriff had sold it at that time; but that after crediting the amount produced by the sale, the plaintiff could issue an execution for the balance. *Carman v. Mott*, 3 Kerr, 131.

#### **2—Issue of—When considered.**

An execution issued in the week which includes the third return day of the term, is deemed to be issued in term, and may be tested on the first day of term though the judgment on which it is founded is not signed until after the first day. *Coffin v. Marsh*, 3 Kerr 427.

**3**———A writ of execution is considered duly issued within the meaning of the Act 7 Vic. cap. 32, sec. 7, when it is sent by the attorney for the *bona fide* purpose of its reaching the hands of the sheriff in the usual course for the transmission of such documents. *Lunt v. Estabrooks*, 3 Kerr 291.

**4—Justification under execution.**

A process, regular on its face, is a justification to the officer. *See Carter v. Purington*, 2 All. 226.

**Justification under warrant of commitment.**

*See Justice of the Peace. Regina v. O'Leary.*

**5**———An execution issued on a summary judgment is a justification to the sheriff, or a person clothed with his authority, for any act done under it, without proof of the filing of the bill of costs. *Patterson v. Tingley*, 5 All. 553.

*Quere*, Whether such proof would be necessary to render the execution a justification to third parties? *Semble*, That the execution is only voidable for the omission to file the bill of costs. *Ibid*.

**6—Sale of personal property after levy on land.**

Where logs were cut by the plaintiff, and carried away from the land of a judgment debtor, after the defendant, as sheriff, had received an execution, under which he had advertised the land for sale, and the defendant under the same execution seized the logs and sold them before the time for selling the real property arrived. *Held*, That he was justified in so doing, and might avail himself of such a defence under the general issue. *Fitzsimmons v. Jones*, 3 Kerr 596.

**7—Ordering writ to be filed.**

Where an action was pending against an attorney for imprisoning the plaintiff on an irregular execution, which was wanted as evidence on the trial, the Court ordered the attorney to file the writ in the clerk's office. *Roberts v. Watson*, 1 All. 94.

**8—Impeaching sale at trial for irregularity of execution.**

The validity of a sale under an execution cannot be impeached on a trial at *Nisi Prius*, on the ground that the execution is irregular for having issued on a judgment more than a year old without a *scire facias*. *Doe v. Watson*, 1 *All.* 675.

**Variance in recital of judgment.**

*See* Variance.

**Sale by sheriff under an alias the original execution need not be proved.**

*See* Sheriff's Deed 6.

**9—Justice of the peace—Sufficiency of execution issued by.**

An execution issued by a Justice of the Peace is sufficient, if it substantially follows the form K in the Schedule to the Rev. Stat. cap. 137; and any person resisting a constable executing it, is liable to an indictment. It is sufficient, if the execution is made returnable in a certain number of days from the date, so that it may be ascertained by calculation. *Reg. v. McDonald*, 4 *All.* 440.

**10—Alias Writ—Excessive amount—Arrest.**

If an execution issues upon a judgment in a Justices' Court within the time limited by the 1 Rev. Stat. cap. 137, sec. 38, an *alias* or *pluries* may afterwards issue, though more than three years have elapsed since the judgment. *Semble*, That an execution issued by a Justice of the Peace for more than the amount of the judgment, is irregular only, and the mere arrest of the defendant under it, is not necessarily a wrong; but otherwise, if he is imprisoned under it for a greater number of days than is allowed by law according to the sum actually due. *Ryan v. James* 1 *Pug.* 122.

**11—Execution for lesser amount than judgment—Tender—Refusal—Imprisonment.**

Defendant recovered judgment against the plaintiff in a



Justice's Court for £3 7s.; the execution issued stated the amount to be *thirty-seven shillings*, which sum the plaintiff tendered to the defendant, who refused to receive it. *Held*, That the execution was not a nullity, and that trespass would not lie against the defendant and the constable for imprisoning the plaintiff on the execution after the tender of the thirty-seven shillings. *Carman v. Wilson, Trin. T. 1864.*

**12—Debtor pointing out property to Constable—Duty to seize it.**

Where the debtor points out property to the constable to levy on it, it is his duty to seize it, unless he has reasonable grounds for believing that it does not belong to the debtor. *Hunter v. Maddox, 1 Han. 162.*

**13—Direction of execution to any Constable.**

The Act 22 Vic. cap. 27, authorising Constables to serve processes in any part of the County in which they are appointed, an execution issued out of a Justice's Court, under 1 Rev. Stat. cap. 137, may be directed to any Constable of the County. The deviation from the form prescribed by cap. 137, does not affect the substance of the execution. *Atkinson v. Desmond, 5 All. 564.*

**14—Property liable to seizure—Interest in Logs.**

Plaintiff obtained a license to cut logs, and agreed with A. to cut and haul the logs, put the plaintiff's mark on them and take them to the mouth of the Oromocto for him; plaintiff to furnish the supplies, pay the wages, and sell the logs at Saint John; and after deducting stumpage, freight, supplies, etc., pay A. any balance that might remain. *Held*, That A. had no interest in the logs that could be seized under execution. *Pelton v. Temple, 1 Han. 275.*

**15—Husband and Wife—Separate property.**

Land was conveyed to a married woman, for life, for her separate use; it was managed under her directions,

and the labour paid for by the produce of the land, the husband not interfering except as her agent. *Held*, 1st. That under the Rev. Stat. cap. 114, the crop, when severed, did not become the property of the husband, and was not liable to seizure under an execution against him, 2nd. That an action for seizing the crop, under execution against the husband, was rightly brought in the name of the husband and wife. *Dow and wife v. Dibblee* 1 *Han.* 55.

**16**———When a husband and wife reside on land of which the wife has the fee, the husband is tenant by the courtesy, and the crops raised by his labour and the labor of his servants and children, are his and liable to seizure for his debts, and the Sheriff may enter to make a levy. In the absence of title, the possession is the possession of the husband. *Pourrier and Wife v. Raymond*, 1 *Hunt.* 512.

**17**———Real estate, in remainder or reversion, may be taken in execution, and sold at Sheriff's sale, under the Act 26 Geo. III, cap. 12 See *Doe v. Hazen*, 3 *All.* 87.

**Estate of Mortgage in fee, not liable.**

See *Supra* I. 3.

**18—Real estate of testator.**

Land which belonged to a testator cannot be taken in execution on a judgment recovered against his executor for a debt due by the testator, either under the Act of Parliament 5 Geo. II, cap. 7, or the Act of Assembly 26 Geo. III, cap. 12. Real estate descends to the heir. License to sell requisite before divested. *Doe dem. Hare v. McCall*, C. *Ms.* 90.

**19—Improper discharge of debtor by Judge's order—  
Issuing *fi. fa.***

One of two joint debtors in custody on execution, was improperly discharged by a Judge's order; the plaintiff's attorney, without applying to rescind the order, issued a *fi. fa.* *Held*, That it was not absolutely necessary to rescind the Judge's order before issuing the *fi. fa.*, and it was allowed to stand—the plaintiff undertaking not to issue

another *ca. sa.* or take any proceedings against the defendant's sureties in consequence of his discharge. *Hogan v. Whitehead*, *Hil. T.* 1871.

**20—Loss of property by Sheriff—Liability of execution creditor—Claims covered by award.**

D. and B. issued a *fi. fa.* against M., under which a levy on personal property was made; the parties afterwards referred all matters in dispute to arbitration. An award was made in favour of M. for \$500, upon which D. and B. withdrew the execution, and directed the Sheriff to hand over to M. the property levied on. *Held*, That D. and B. were not liable for any articles which had been lost by the Sheriff. If any such claim could otherwise have been set up, they were at all events precluded by the award. *Miller v. Daniel*, *et. al.*, 2 *Pug.* 113.

**21—Homestead Act.**

Sheriff's sale good for whole lands, unless application made by debtor or his wife in conformity to Act. *Pourrier v. Harding*, 2 *Pug.* 120.

**22—Execution in lieu of attachment.**

To obtain an execution in lieu of an attachment under Act 38, Vic. cap. 4, sec. 22, (Consol. Stat. cap. 38, sec. 27), the same facts must be shewn as were formerly necessary to obtain an attachment. *Cotton v. Stack*, 3 *Pug.* 211.

**23—Corporation.**

Shares may be seized and sold under execution, though no stock certificates may have been issued. *E. & N. A. Railway Company v. McLeod*, 3 *Pug.* 3.

**Excessive Amount.**

*See Supra* I. 8.

**Injunction to restrain selling under execution Contesting Sale at Law.**

*See Practice in Equity* II. 4.

**Replevin—Separate Execution.**

*See* Costs 139. *Read v. Botsford.*

**Insolvent Debtor discharged—Refusal to allow second execution against.**

*See* Insolvent Debtor 17.

**Memorial—Priority over subsequent judgment and execution.**

*See* Memorial.

**Poundage.**

*See* Sheriff.

**Costs of Appeal from decision of Judge in Equity recoverable by attachment, not by execution.**

*See* Costs 91. *Smith v. Armstrong.*

**EXECUTORS AND ADMINISTRATORS.**

- I. ACTIONS BY AND AGAINST.
- II. RIGHTS AND LIABILITIES.
- III. EXECUTOR DE SON TORT.
- IV. ADMINISTRATION—GRANT OF—PROOF—PROBATE.
- V. MISCELLANEOUS.

I.

ACTIONS BY AND AGAINST.

**1—Debt for specific legacy.**

A legatee may maintain an action of debt against an executor for a certain legacy given by his testator. *Livingstone v. Powell et. al., Executors of Powell, Ber. 225.* (*See* Action at Law IX. 16.)

**2—Suspension of action.**

Actions against executors or administrators for the recovery of debts due from the testator or intestate, are not suspended for eighteen months under the Act 3 Vic. cap. 61; the thirty-fifth section has no such operation. *Cunliffe v. Morehouse, 2 Kerr 311.*

**3—Set-off—Bond—Penalty.**

In an action against an administrator on a promissory note given by the intestate, he pleaded *plene administravit*, and gave notice under the Statute of a bond debt due and outstanding, and no assets *ultra*. *Held*, That the sum actually due on the bond, and not the penalty, was the amount which the defendant was entitled to set off against the assets in hand. *Sherlock v. McGee*, 2 *Kerr* 508.

**4—Assets not accounted for—Insufficiency to pay—Limitation of recovery.**

It is competent for a creditor in an action at law against the executor, where the amount of assets is in question, to shew that assets came to his possession for which he has not accounted in the Surrogate Court; but where it appears that the executor has assets sufficient to pay a larger dividend than that alleged in his plea or notice under the Act, but not enough to pay the whole debts, the recovery will be limited to the rateable proportion which the creditor is entitled to receive from the assets. *Harrison v. Morehouse*, 2 *Kerr* 584.

**Representative character—Liability for money bequeathed—No averment of receipt of money.**

*See* Pleading I. 25.

**5—Administration by two out of three defendants—Small assets in hands of third—Verdict for defendants.**

In an action against three defendants, as executors, two of whom had fully administered, and the amount in the hands of the other defendant was very small, the Court refused to set aside the verdict in favour of all the defendants. The plaintiff might have had a verdict against the defendant shewn to have assets in his hands. *Crookshank v. McFarlane*, 2 *All.* 544.

6—Executor of the assignee of a bail bond may bring an action upon it. *Scribner v. Gibbon*, 4 *All.* 182.

**7—Executors appointed by power in will—Right to sue.**

A testator named seven executors in his will, and directed that if any of them should die or renounce, the remaining executors should by writing appoint others in their place, so that the same number should always exist. Two of the executors named in the will died, and the survivors appointed two others, who were sworn as executors, and probate granted to them by the Judge of Probates, after the original probate granted. *Held*, That these seven persons could sue as executors. *Wright v. Stackhouse*, 5 *All.* 450.

**8—Covenant—Breach in life time of testator.**

Where breach of a covenant for title and the damage resulting therefrom, both occurred in the life-time of the testator, the action for such breach should be brought by the executor. *See* Covenant 14.

9———If covenant for title is broken in the life-time of the covenantee, no estate descends to the heir, and an action for the breach is properly brought by his executor. *See* Covenant 14.

**10—Proving promise.**

In an action by an administrator for work and labour of the intestate, and alleging only a promise to the administrator, the plaintiff must prove the promise as laid. *Stevenson v. Perley*, 3 *Kerr* 398.

## II.

## RIGHTS AND LIABILITIES.

**1—Executors of deceased administrator.**

The executors of a deceased administrator have no right to file an account of his administration in the Probate Court; nor has the Judge of Probate any authority to pass such an account if filed. *In re Frost*, 1 *Han.* 127.

2———An administrator *cum testamento annexo* died without having filed any accounts of his administration.

*Held*, That the Probate Court, on the application of the residuary legatees under the will, had no jurisdiction to pass accounts filed by the executors of the deceased administrator; an administrator *de bonis non, cum testamento annexo*, who would be bound to account, and to whom the executor of the deceased administrator would be liable in the first instance. *In re Frost's estate*, 6 All. 482.

### **3—License to sell—No waiver of right to sell by will.**

Executors obtaining license to sell from the Governor and Council, do not waive any right they have to sell under the will. *Doe dem. Pike v. Tierney*, Hil. T. 1831.

### **4—Claim by administrator—Allowance.**

A claim of an administrator against the estate for maintenance of the intestate may be included, in and allowed in his account passed by the Probate Court; but the claim must be limited to six years. *Ex parte Holly* 5 All. 406.

5—Where the Probate Court allowed the administrator's claim for maintenance for ten years, but during the first four years of that period he had received the proceeds of the intestate's farm, the amount of which he had a right to appropriate towards the payment of his charge for maintenance, the Supreme Court, on appeal, ordered the difference between the two sums to be deducted from the administrator's account. *Ibid*.

### **6—Application of assets to payment of Executor's claim.**

Where there is no fraud or collusion, an executor may apply the assets of the testator in payment of his own debt; though in case of a deficiency of assets to pay debts or legacies, the alienee of the property (knowing that it belonged to the estate) may be liable in equity to creditors or legatees, or the next of kin. *Allingham v. Daniel*, Trin. T. 1871.

### **7—No right to pay debts in preference, nor retain.**

Where the Act 26 Geo. III, cap. 11, sec. 18, directing

executors, where an estate is insolvent, "to divide it in due proportion to and among the creditors,"—it is their duty to pay debts according to the common law priority of classes, and *pari passu* in each class, and they have no right to pay any one creditor in preference, nor to retain for the whole of their own debts of the same class. *Joseph v. McLeod, Trin. T. 1888*

### **8—Costs—Liability to.**

If any executor declares on promises to himself, he is liable for costs. *Executors of Grosvenor v. Agnew, Ber. 29.*

9—An administrator will not be relieved from his liability to the payment of costs, under Act 7 Wm. IV, cap. 14, sec. 23, where he moves, not on matters appearing at the trial, but upon affidavits which are sufficiently answered by the defendant. *Semble*, That Act extends only to cases in which executors or administrators were before that Act exempted from the payment of costs. *Thompson Allanshaw, 1 Kerr 209.*

### **10—Absconding debtor holding property as administrator—Trustees not entitled to.**

*See Absconding Debtor 4.*

### **11—Assignment of mortgaged land.**

An executor cannot assign the legal estate in land mortgaged in fee to his testator, unless the land is devised to him : without such devise, his assignment will operate only as a transfer of the mortgage debt. *See Doe v. Hanson, 3 All. 427.*

### **12—Deposit of money by two persons—Death of one—Right of administrator.**

A sum of money was deposited in a bank, for which a receipt was given in the following words : "Received from P. C. and H. C., to be drawn by either of them, or the survivor, \$1400, for which we are accountable with interest, on receiving fifteen days notice." P. C. sent the receipt to the bank, and applied for the money, but the Manager not being satisfied that the person who brought the receipt



had authority to receive the money, declined to pay it. P. C. died three days after this. *Held*, That on his death, the right to receive the money vested in H. C., and that P. C.'s administrators could not recover it from the bank. *Condon v. Bank of B. N. America, Trin. T. 1870.*

**13—Bank Stock undisposed of—Suspension of payment by bank—Liability of executors.**

A testator died possessed of bank stock, which his executors allowed to remain undisposed of, and received the dividends. By the terms of the bank charter the Stockholders were individually liable for the payment of the debts of the bank, in proportion to the stock they held. About two years after the death of the testator, the bank suspended payment, and was wound up under the Act 27 Vic. cap. 44, and a call made on the executors as contributories. *Held*, That they were liable therefor in their representative capacity, and that the payment of legacies under the will could not be allowed against their contingent liability to calls under the charter. *McKenzie, Curator &c. v. King, Mich. T. 1871.*

**14 — Liability of testator as executor — Inventory—Legacy charged on land—Executor's accounts.**

A liability of the testator as an executor, is a debt chargeable on the funds bequeathed by him for payment of his debts, though his liability may arise from a devastavit. Rent payable on a lease under seal executed by the testator, is also chargeable on funds, so bequeathed, though such rent does not accrue till after his death. Land was devised to an executor to sell, if necessary, to meet any deficiency of assets for payment of debts and legacies. After the execution of the will, the testator conveyed the land to the executor, who undertook to pay the purchase money, and charged himself with it in the inventory. *Held*, That he was liable for the amount, and that it formed part of the residuary estate. *Wetmore et al v. Ketchum, 5 All. 408.*

**15 —**When a legacy is charged on land devised, it should not be included as a payment by the executor, in his account with the estate. *Ibid.*

## III.

## EXECUTOR DE SON TORT.

**1—Wife continuing business after the death of husband.**

The wife of a grocer and liquor seller, who continues after his death to keep the house open and sell liquors left therein at his decease, is made thereby an executrix *de son tort*; and cannot protect herself under the plea of *ne unques executrix* against a demand by a simple contract creditor of her husband, by shewing that there was an outstanding judgment against her husband for an amount exceeding all the assets of the estate. *Keith v. Perks*, 2 *Kerr* 552.

**2—Brother of deceased—Agreement to take property and pay debts — Parties to agreement — Subsequent discharge.**

The brother of a deceased person, at the request of his creditors, made an agreement with them to take the property of the deceased and pay them a proportion of their respective claims on getting a discharge. The property was placed in the hands of a third person by the creditors till the agreement could be performed, but it was soon afterwards abandoned. *Held*, That all the parties to the agreement were liable as executors *de son tort*, but that they discharged themselves from liability by afterwards delivering the property to the administrator before action brought. *Crookshank v. McFarlane et al.*, 2 *All.* 544.

**3—Intermeddling with goods.**

Any dealing with the goods of a deceased person, by which the party so dealing assumes to exercise a control over the goods, is evidence against him as executor *de son tort*. *Powell v. Wathen*, 5 *All.* 258.

**4**———In an action charging a person as executor *de son tort* by meddling with the goods of the deceased, a declaration of the deceased, while in possession, that the goods did not belong to him, is evidence for the defendant. *Ibid.*

## IV.

## ADMINISTRATION—GRANT OF—PROOF—PROBATE.

**1—Acting as Administrators—Entry in book.**

The plaintiff claimed under a deed from two persons as administrators, but there was no positive proof that letters of administration had been granted, and no administration bond could be found or was known to have existed; the Court refused to disturb a verdict for the defendant, finding that no letters of administration were granted, though the vendors had acted as administrators for several years, and though it appeared by an entry made at the time in a book kept by the Judge of Probates that administration was so granted: it being uncertain whether this entry was an official act—the case having been tried before—and the plaintiff's right to recover being doubtful on other points. *Doe v. Read*, 1 All. 68.

*Semble*, Administration, if granted, is not void for want of an administration bond; but the absence of one is a strong fact to rebut a presumption that administration was granted. *Ibid*.

**2—Remaining good until revoked—Seal—Surrogate's Acts.**

Administration irregularly granted (as to a creditor without citing the next of kin,) remains good till revoked by the proper Court. Letters of Administration must be under seal, but no particular impression is necessary. Any seal used by the Surrogate for the purpose is sufficient, till a particular seal is provided. It will be presumed that a person acting as Surrogate has taken the oath of office; but if he has not, his acts will not be invalid if he has been appointed to the office. *Crookshank v. Giberson*, 2 All. 544.

**3—**Affidavit endorsed on deed, not evidence of grant of administration. *See Evidence IV. 2.*

**What it is evidence of.**

*See Evidence IV. 3.*

**4—Letters of Administration—Evidence of intestate's death.**

*See Scribner v. Gibbon, 4 All. 182.*

**5—**Probate of Will, though registered, is not evidence of a due execution to pass real estate. *See Hamilton v. Love, 2 Kerr 248.*

**6—Foreign Probate—Pleading.**

Probate of a Will in Nova Scotia gives no title in this Province; nor will probate granted in this Province, after declaration and issue joined, support an action by the executor. *Mitchell v. Long, C. Ms. 76.*

## V.

## MISCELLANEOUS.

**Assumpsit on Promises and Foreign Judgment.**

*See Pleading I. 19.*

**Promises laid to Plaintiff as Administrator.**

*See Pleading I. 18.*

**Estate Insolvent—No ascertaining of insolvency—Distribution of Assets.**

*See Pleading II. 86.*

**1—Execution—Real Estate.**

Lands of a Testator cannot be taken in execution under the Act 26 Geo. III. cap. 12, on a judgment against the executor for a debt of the testator. *Doe dem. Hare v. McCall C. Ms. 90.*

**2—Notice to sell Land—Extent of time—Posting up—Publication.**

A Notice to sell Land by Executors, by virtue of a license from the Governor and Council, under the Act 26 Geo. III. cap. 11, sec. 18, must be given thirty days, exclusive of the day of sale, both by posting up notices and by publication in the newspaper; but it is not necessary to prove that the notices posted up continued up till the day of sale. *Doe dem. Pike v. Tierney, Hil. T. 1881.*

**3—Acknowledgement of Debt—Statute of Limitations.**

The mere acknowledgment of a debt by an adminis-

trator is not sufficient to take the case out of the Statute of Limitations : there must be an express promise to pay. *Gibbs v. Sewall, Trin. T. 1888.*

**4—Legacy—Bill filed for payment of—Distribution of Assets—Reference to take account.**

The plaintiff and defendant were executors of A. who bequeathed a legacy of £50 to the plaintiff's wife, charged upon land devised by the will to the defendant. On a bill filed for the payment of this legacy, it appeared that the plaintiff, as executor, had received assets belonging to A.'s estate, which he had not accounted for, and that the defendant had in consequence been obliged to charge the real estate devised to him, to raise money to pay the testator's debt. At the hearing, a reference was directed to inquire what moneys belonging to the estate had been received by the plaintiff, and how he had applied them. On appeal by the plaintiff from this order: *Held*, The inquiry was proper; and that if the plaintiff had caused the fund from which the legacy was to be paid, to be used for the payment of the testator's debts, the defendant should hold that fund discharged from the legacy, or so much thereof as the plaintiff had virtually received from the assets in his hands. *De Veber v. Andrews, 8 All. 383.*

**5—Description—Character—Proof.**

The plaintiff in ejectment claimed under a lease from the corporation of Saint John to J. H. and C. H., describing them as executors of J. G. H. deceased; and an assignment of that lease to the plaintiff from the said J. H. and C. H., also describing themselves as executors of J. G. H. *Held*, That by the lease from the corporation the title vested in J. H. and C. H., and that it was not necessary to prove that they were executors as described. *Doe dem. Hatheway v. Rogers, Mich. T. 1866.*

**6—Executors and administrators — Assets — Real estate.**

On an issue of *plene administravit* real estate of an intestate unsold is not assets in the hands of his administrator for payment of debts.

*Quære*, Whether under a different issue an administrator might be made liable for the value of real estate which he had neglected to make available. *Crawford v. Wilcox et. al*, 1 *All.* 684.

**7—Payment to one administrator.**

In an action by plaintiff as surviving administrator against defendant as maker of a note, it appeared that the note was given for goods of the estate sold J. D., sister of defendant, who gave his note for the amount. The note remained in plaintiff's hands, but J. D., without the knowledge of plaintiff paid the amount to the deceased administrator. *Held*, that the payment was valid, and that these formed no evidence of fraud which could be left to the jury. *Trueman etc. v. Dixon*, 1 *P. & B.* 88.

**Judgment against executor—Staying execution—Estate insolvent.**

*See* Execution III. 4.

**Plaintiff's remedy against executor in equity—Money received by executor.**

*See* Assumpsit III. 14.

**Death of husband—Separate earnings of wife.**

*See* Husband and Wife.

**Promissory note to A. or heirs—Right to.**

*See* Bills and Notes I. 7.

**Surrogate Court—Decision—Finality.**

*See* Surrogate Court.

**Discharge of Debtor by persons beneficially interested under will.**

*See* Discharge.

**Acts of personal representative enuring to benefit of heirs and minor children of deceased to shew possession.**

*See* Trespas II. 2b.

**Application to put bond in suit.**

*See* Bond D.

**Injunction to restrain Administrator from selling land—Sufficiency of assets—Application to dissolve, refused until defendant shewed sufficiency of assets.**

*See Coy v. Coy, 1 Han. 177.*

**License to sell land—Irregularity of proceedings—Remedy.**

*See Deed I. 40*

### **EXONERETUR.**

*See Bail.*

The Bail are entitled to have an exoneretur entered on the bail piece, although the defendant may have escaped between the time of render to the custody of the gaoler and notice thereof to the plaintiff's attorney, when such notice has been given in a reasonable time. Six days is not an unreasonable time for this purpose. *Ratchford v. Giles, 1 Kerr, 459.*

**Double arrest.**

*See Practice. VI. 26.*

### **EXPERTS.**

*See Evidence VIII. 14, 80.*

*Witness.*

### **EXPULSION.**

*See Trespass.*

### **EXTINGUISHMENT.**

*See Suspension—Satisfaction.*

*Bills and Notes V. 29, 80, 81.*

*Mortgage 17.*

### **EXTRACTS.**

*See Evidence.*

### **EXTRA WORK.**

*See Assumpsit III. Contract 10.*

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**FALSE IMPRISONMENT.**

*See* Trespass.

**FALSE PLEA.**

*See* Pleading.

**FALSE REPRESENTATION.**

*See* Warranty

Fraudulent Representation.

**FALSE RETURN.**

*See* Election Law.

**Action against Sheriff for.**

*See* Evidence III. 7.

**Constable making.**

*See* Constable.

**FALSE STATEMENT.**

*See* Insurance 28.

**FEEs.**

*See* Attorney General — Attorney — Criminal Law—  
Costs—Sheriff.

**FEIGNED ISSUE.**

*See* Practice XII.

**FELONY.**

*See* Criminal Law.

Trover 3.

**FENCES.**

Wilfully injuring a fence under the 1 Rev. Stat. cap. 158, sec. 11, is not punishable by summary conviction.—  
*Sed quare.* *See* Justice of the Peace IV. 11.

**Duty of Commissioners of Highways to remove fence**

*See* Highway 15.

**Breaking into field under lawful fence.**

*See* Trespass II. 2.

**FENCE VIEWER.**

**Person employed by—May maintain action.**

*See* Action at Law IX. 8.



**FEOFFMENT.**

*See* Deed.

**FERRY.**

The Charter of Fredericton, 22 Vic. cap. 8, which gives the Corporation power to establish and regulate ferries within the limits of the City, does not take away the right to a ferry previously granted by the Crown, nor authorise interference with such pre-existing ferry. *University of New Brunswick v. McClusky*, 6 All. 136.

The Crown granted a ferry across the river Miramichi, between the parishes of C. and N., opposite the Court House of the County, and communicating with the highway on each side of the river; the landing used on one side of the river was about two hundred yards above the Court House. *Held*, That it was an infringement of the grantee's right to establish another ferry landing at the same place. *Fraser v. Drgnan*, 4 All. 74.

**FERRY BOATS.**

The title of ferry boats running in the harbour of St. John must be transferred according to the provisions of Merchants' Shipping Act. *Lloyd v. E. & N. A. Railway Co.*, 2 P. & B. 194.

**FIELD DRIVER.**

*See* Damage Feasant.

**FIERI FACIAS.**

*See* Execution.

**FILING PAPERS.**

*See* Practice.

**FINES.**

*See* Justice of the Peace (Conviction).

**FIRES.**

An action of debt will not lie to recover damages sustained in consequence of a fire kindled by the defendant, the remedy by action of debt, given by the Act 26 Geo. III, cap. 80, relating only to the recovery of the penalty thereby imposed, and not interfering with the common law remedy. (*See Wiley v. Crawford*, 1 B. & B. 253.) *Russel v. Sutherland*, C. Ms.'80.

**Water Company—Duty of keeping water to prevent fire.**

*See* Water Company.

**Action by Landlord—Premises burnt by fire by alleged negligence of tenant.**

*See* Action on the Case I. 2.

**Accidental Fire—Liability for.**

*See* Action on the Case I. 1.

**FISHERY.****1—Right of.**

By the Act 14 Vic. cap. 81, the Governor in Council was authorised to grant leases or licenses of occupation for Fishery Stations on the ungranted shores, beaches or Islands of the Province. A grant was made to the plaintiff for the exclusive leave and license to occupy and enjoy as a Fishing ground for the term of four years, a lot or beach abutted and described as follows, viz: lot No. 4, on the outside of Portage Island; with the full and exclusive privilege of using the said lot or station as a Fishing station. *Held*, That this grant did not convey any right of fishing, but merely a right to occupy a certain portion of the shore, and therefore that the defendant was not liable to an action for setting nets in front of the plaintiff's lot below low water mark, and therefore preventing the fish from entering the plaintiff's nets. *Hierlihy v. Loggie*, 3 *Al.* 204.

**2**——The right of fishing in a public navigable river belongs to the public, and not to the owners of the lands bounded on the river. *Rose v. Belyea*, 1 *Han.* 109.

**3—Weir—Erection of.**

No action can be maintained for erecting a fish weir between high and low water mark in an arm of the sea, whereby fish, which otherwise would have been caught in the plaintiff's weir, were caught by the defendant. *Cheney v. Guptail*, *East.* 7. 1871.

**4—Right in Dominion of Canada to grant exclusive right of fishing in rivers above flow of tide.**

Plaintiff was lessee of a part of the South-west Miramichi River, for the purpose of fly-fishing for salmon, by

virtue of a lease granted to him by the Minister of Marine and Fisheries under authority of the Fisheries' Act 31 Vic. cap. 60, subject to certain conditions and provisos, among which was one providing that actual settlers should enjoy the privilege of fishing with a rod and line in front of their own properties, and the Minister also reserved the right of four rods. Defendants, being British subjects, entered upon a portion of the river leased to plaintiff, and fished for and caught salmon against the will of the plaintiff, for which plaintiff brought an action of trespass. That part of the river in which the alleged trespass was committed was above the ebb and flow of the tide (as in fact was the whole of that part of the river leased to plaintiff,) and was navigable for canoes and small boats to pass and repass thereon, and had been used since the earliest settlement of the country by the public as a highway for such canoes and small boats, and to float down loose timber and logs to market in very large quantities. The lands bordering on both sides of the river were granted by the Crown to the New Brunswick and Nova Scotia Land Company, who had conveyed a portion thereof to different persons; the bed of the river was, however, in the grant expressly excepted therefrom and reserved. A case being stated by agreement of the parties, for the opinion of the Court. *Held*, (Per Allen, C.J., and Weldon and Duff, J.J.; Fisher, J., dissenting,) That the Dominion of Canada, under "The British North America Act, 1867," and Fisheries' Act of Canada, had power to grant the lease in question.

*Semble*, That in non-tidal rivers, when the bed of the river is reserved, and remains the property of the Crown, the public would have the same common right of fishery that they have in tidal rivers and arms of the sea.

*Semble*, That where the land bordering on a non-tidal river is granted, without the bed of the river being reserved, and the grantee has, by law, the exclusive right of fishing in front of his own land, *ad medium filium aquæ*, the Fisheries' Act would not authorize the granting of a lease. *Robertson v. Steadman*, 3 Pug. 621.

**FISHING VESSEL.**

*See Foreign Fishing Vessel.*

**FIXTURES.****1—Landlord and tenant—Agreement.**

An agreement by a tenant of a shop, that if the landlord would make certain improvements, the tenant would put in gas fittings and leave them there when the lease expired, is executory only, and vests no property in the gas fittings in the landlord unless they are left by the tenant in the shop. If they are removed by the tenant before he leaves, the landlord cannot maintain trover for them. *Dunn v. Garrett*, 2 All. 218.

**2—Building erected on land of another.**

Where a building is erected on the land of another, the fact as to whether or not it is a fixture, and capable of removal, depends in most cases upon the intention of the parties at the time of its erection, and not upon whether or not it is fastened to the soil. *Fowler v. Fowler*, 2 Pug. 488.

**3—Building merely resting on land.**

When a building is erected on land, but is no further attached to it than by its own weight, it will become part of the freehold if it is apparent it was erected with this intention. *Doran v. Willard*, 1 Pug. 358.

**FORECLOSURE.**

*See Equity.*

*Practice in Equity.*

*Mortgage.*

**FOREIGN CORPORATION.**

*See Corporation.*

**Insurance Company doing business in Province.**

*See Insurance* 51. 52. *Allison v. Robertson. Jones v. Taylor.*

**Whether debts due by, can be garnisheed.**

*See Attachment* 51. *Ranney v. Morrow.*

**FOREIGN FISHING VESSEL.**

Defendant, an officer appointed by the Canadian Gov-

ernment for the protection of the Fisheries, seized a vessel belonging to the plaintiff in the harbour of Gaspe, in the Province of Quebec, on the 18th August, for an alleged breach of the Act relating to fishing by Foreign Vessels, (81 Vic. cap. 61,) and on the 22nd August brought the vessel to the Port of Shediac, in the Province of New Brunswick, but did not deliver her to the Collector of Customs there. The Act directed that vessels seized should be "*forthwith* delivered to the Collector or other principal officer of Customs at the port *nearest* the place where seized." There was a Collector of Customs at Gaspe, and at several other ports nearer than Shediac. No proceedings having been taken towards the condemnation of the vessel, the plaintiff replevied her on the 5th Sept. *Held*, per Ritchie, C. J., Allen and Weldon, J. J., That by taking the vessel to Shediac and retaining her there in his own possession the defendant became a trespasser *ab initio*, and that replevin would lie. Per Fisher and Wetmore, J. J., That by the seizure the vessel was in custody of the law, and therefore replevin would not lie. *McGowan v. Betts*, *East. T.* 1871.

#### FOREIGN GOODS.

*See* Custom Duties.

#### FOREIGN JUDGMENT.

*See* Judgment.

#### FOREIGN LAW.

I———Plaintiff became surety for the defendant in an administration bond in Massachusetts. On passing the defendant's accounts in the Probate Court there, a balance belonging to the estate was found to be in his hand, which he neglected to pay, whereby the bond became forfeited: the defendant then resigned the office of administrator, and the plaintiff was appointed administrator *de bonis non*. In an action in this Province, for money paid by the plaintiff to the defendant's use, it was proved that by the law of Massachusetts the amount for which the plaintiff was liable as surety in the administration bond was considered

as paid by him by operation of law on his appointment as administrator—he being thereby made liable for the amount—and that he could therefore maintain an action against his principal for money paid. *Held*, That such being the foreign law, the action was maintainable here. *Valentine v. Hazelton*, 1 *Han.* 110.

2—Foreign law is a question of fact, to be found by the jury, and not to be determined by the Judge; therefore, when the plaintiffs, in order to prove their right to sue, as Receivers of a Foreign Corporation, put in evidence the Statutes of New York, providing for the winding up of Insolvent Corporations and the appointment of Receivers by the Court of Chancery; and also proved by the evidence of a witness, that Insolvent Corporations were wound up, and Receivers appointed by the Supreme Court of the State, without any explanation to shew that the Statute had been altered, and the jurisdiction taken away from the Court of Chancery; and no question was left to the jury as to what the foreign law was; a verdict for the plaintiff was set aside. *Osgood v. Hatch*, *Mich. T.* 1872.

3—The written law of a foreign country may be proved by a skilled witness, without the production of the law itself; but where it can be produced, it is more satisfactory than verbal testimony. *Osgood v. Hatch*, *Mich. T.* 1872.

#### FOREIGN PROBATE.

See Executors and Administrators.

#### FORFEITURE.

See Crown Grant.

Custom House Entry.

Justice of Peace (Conviction).

#### FORGERY.

See Criminal Law.

#### FORMER RECOVERY.

See Action at Law VIII. 3. Evidence III. 17.

Justice of the Peace V. 5.

Landlord and Tenant VII. 5.

A verdict recovered without judgment signed cannot be pleaded in bar to an action between the same parties. *Gilbert v. Graham, East. T.* 1878.

**When admissible in evidence in Replevin without being pleaded.**

*See Evidence III. 17.*

#### **FORMER DECISION.**

##### **Reversal.**

Where it appeared to the Court that a former decision was inconsistent with the right application of a clear and well established principle of law, it reversed the former decision without the intervention of a Court of Appeal. Allen, J., without differing from the rest of the Court as to the principle of law, thought that the Court having, in Calhoun's case, decided that persons were not disqualified from acting as commissioners by reason of being land owners, the Court was bound by that decision until reversed by a Court of Appeal—*Regina v. Commissioners of Sewers, Germantown Lake, 1 Han.* 343.

#### **FARMS.**

*See Justice of the Peace IV. V.*  
*Bond C.*

#### **FOUR DAY RULE.**

*See Error 5.*

Judgment signed in term, 20 days having elapsed since verdict, not necessary to enter four day rule. *Jones v. Betsford, 3 Pug.* 489.

##### **Fraction of a day.**

*See Execution I. 7 21.*

#### **FRAUD.**

**Assignment of goods—Defeating execution—Bona Fides.**

*See Assignment 1.*

**Goods claimed under previous assignment—Taking on execution bona fides.**

*See Assignment 2.*

**Estate conveyed for fraudulent purpose — Trustee bound to convey—Avoidance by infant cestui que trust—Fraud a question for jury.**

*See* Infant 5.

**Judgment on award—Setting aside for fraud.**

*See* Practice VI. 5.

**Lease—Contravention of agreement—Cognizance.**

*See* Landlord and Tenant VI. 1.

**Release—Surviving plaintiff setting aside for fraud.**

*See* Practice VI. 1.

**False Declaration—Ownership of Ship.**

*See* Shipping Law 6.

**Trust deed—Creditors—Fraud.**

*See* Deed III.

**Warrant of Attorney—Setting aside for fraud.**

*See* Warrant of Attorney.

**Contesting receipt on ground of fraud—Attorney proceeding to trial after receipt given.**

*See* Receipt.

## FRAUDS (STATUTE OF).

*See* Contract—Agreement—Guarantee.

### 1—Interest in land—License to cut timber.

A license to cut a quantity of timber within certain prescribed limits, *and to remove the same*, does not convey any interest in lands under the Statute of Frauds, or give any property in the standing trees. *Kerr v. Connell*, *Ber.* 133.

### 2—Delivery of goods—Acceptance.

A mere delivery of goods by the vendor without an actual acceptance by the vendee of some part thereof, is not sufficient within the Statute of Frauds. *Doley v. Marks*, *Ber.* 346.

The receipt of goods by a common carrier from the vendor, without any specific direction or authority from the vendee, will not amount to an acceptance by the vendee within the Statute. *Ibid.*



**3—Justice's Court.**

The Statute of Frauds is equally applicable to cases brought in the Justice's Courts, as to actions brought in other Courts. *McKeen v. Brown, East. T. 1831.*

**4—Debt of third party.**

B. applied to plaintiff to hire a horse and was refused, defendant then said to plaintiff "Let him have the horse and I'll be responsible if anything goes wrong." Plaintiff thereupon let B. have the horse and he injured him. *Held*, That such promise was within the Statute of Frauds, and not being in writing, defendant was not liable. *Hamm v. McAfee, 5 All 386.*

**5—Lease for three years from future time—Tenancy.**

A verbal agreement to lease premises for three years from a future time is void under the Statute of Frauds, and although by entry and payment of rent to the mortgagor in possession, the party would become a tenant from year to year, as to him, he would be nothing more than a tenant at will to the mortgagee or a person claiming through him. *Brewing v. Berryman, 2 Pug. 115.*

**6—Agreement to remain out of business for a year.**

An agreement stated in the declaration, that defendant would remain out of business for a period of nine months, from the time when plaintiff should begin business, which is alleged to have been three months after the making of the agreement, is substantially proved by an agreement that defendant would remain out of business for a year, and such an agreement is not within the Statute of Frauds. *Whittaker v. Welch, 2 Pug. 436.*

**7—Contract not in writing—Condition fulfilled.**

After delivery of logs to defendant, he cannot object in action for breach of the agreement in not paying a sum of money to a creditor of plaintiff, in consideration of getting the logs, that the contract is void under the Statute of Frauds, not being in writing. *See Agreement 5.*

**FRAUDULENT CONVEYANCE.**

*See Deed—Ejectment II. 10.*

**FRAUDULENT REMOVAL.**

*See Distress.*

**FRAUDULENT REPRESENTATION.**

*See Warranty.*

L., residing in St. John, drew bills of exchange on plaintiff at Liverpool, which he accepted for the accommodation of the defendants, who agreed to guarantee the payment of them at maturity: these bills would fall due on the 2nd Sept. 1868, on the 11th August L. drew other bills on the plaintiff, also for the defendants' accommodation. The plaintiff received L.'s letter advising the drawing of these bills, on the 24th August, and not having at that time received funds from the defendants to take up the bills falling due on the 2nd Sept., telegraphed to L. that unless those funds were sent he would not accept the bills drawn on the 11th August. At this time L. had become insolvent and left the Province, having assigned his property to trustees for the benefit of his creditors. The trustees received the plaintiff's telegram, and took it to the cashier of the Bank who knew that L. had absconded, and an answer was sent to the plaintiff by cable, in the name of L., stating that funds had been sent by the last mail, which was the fact. In consequence of this answer the plaintiff accepted the bills drawn on the 11th August, and was obliged to pay them, L. not having shipped cargoes of lumber as he had agreed. The telegram sent to the plaintiff was in the handwriting of one of L.'s trustees, but was sent to the telegraph office by the cashier of the Bank, and the cost of transmitting it charged to L. in the Bank books. The cashier swore that it was sent by direction of the President of the Bank, but he, and also the Directors, denied all knowledge of it till several months afterwards, and after the cashier had become a defaulter and absconded. *Held*, in an action against the Bank for falsely representing by the telegram that L. was in St. John, whereby plaintiff was induced to accept the bills, (per Allen and Fisher, J. J., Weldon, J., *discentiente*,) That answering the telegram addressed to L.

was not within the scope of the cashier's duties, and therefore that it should have been left to the jury to find whether the answer was sent by the authority of the Directors: and *quære*, whether the Stockholders would be liable even if the Directors had authorized it. Per Weldon, J., That as the telegram to L. related to the payment of the bills of exchange in which the bank was interested, the cashier had authority to answer it, and the defendants were liable for his false representation. *McKay v. The Commercial Bank*, 1 Pug. 1.

**Reversed on appeal to Privy Council.**

See L. R. 5 Privy Council Appeals, page 394.

### **FRAUDULENT TRANSFER.**

See Evidence I. 14.

### **FREDERICTON (CITY OF).**

See By-Laws — Corporation — Costs — Justice of the Peace.

#### **1—Offences—Trial—Justice of Peace of County not an Alderman—No right to sit with Mayor.**

Under the Act 26 Vic. cap. 33, which requires all offences committed in Fredericton, and punishable by summary conviction, to be tried before the Mayor and an Alderman; a Justice of the Peace for the County, who is not an Alderman, has no jurisdiction to sit with the Mayor and try an assault. *Ex parte Hughey*, 6 All. 59.

#### **2—Mayor—Jurisdiction.**

The jurisdiction of the Mayor of Fredericton as a Justice of the Peace, under the Act 22 Vic. cap. 8, sec. 82, is limited to matters arising within the limits of the City; therefore, he has no right to sit in the Sessions of the County of York on the trial of a bastardy case arising outside of the city. *Reg. v Carson*, 6 All. 138.

#### **3—Right to vote—Assessment in each Ward.**

A person assessed on property in several Wards of the City of Fredericton, has a right to vote in each Ward in which he is assessed, under the Act 22 Vic. cap. 8, sec. 17. The election for each Ward is a different election. *Ex parte Grieves*, 6 All. 56.

**4—Contractor—Interest—Disqualification—Quo warranto.**

A contractor with the Commissioners of the Alms House for the County of York is disqualified from being elected a City Councillor in Fredericton, under the Act 22 Vic. cap. 8, and a decision of the City Council in favour of the election, on complaint of an elector, under the 24th section of the Act, does not preclude the elector from applying for a *quo warranto* to try the right. *Ex parte Cameron v. 1 Han.* 806.

When a person elected a City Councillor has entered upon, and is exercising the office, a *quo warranto* is the proper mode of trying his right to it. *Ibid.*

**5—Complaint—Prosecution for engaging in occupation without license—Information.**

A complaint against a party, under 26 Vic. cap. 38, sec. 2 for engaging in an occupation in the City of Fredericton, not being a rate-payer of the City or County, or licensed, should be prosecuted in the name of the City Treasurer. For the recovery of all fines and penalties under any Act relating to the municipal affairs of the City of Fredericton, the information should be laid by the City Treasurer, or by his authority: and a conviction therefor, founded on the information of a common informer, cannot be sustained. *Ex parte Eagles, 2 Han.* 51.

**6—Mayor a ministerial officer—Refusal to swear in person properly returned.**

The Mayor of Fredericton, in swearing in an Alderman elect, under the Act 22 Vic. cap. 8, is merely a ministerial officer, and has no power to refuse to swear in a person properly returned by the presiding officer as duly elected; on the ground that he was (in the opinion of the Mayor) disqualified by law from being elected. *Ex parte Richards, 2 Han.* 131.

**7—Quo Warranto—Discretion of Court in granting—Mayor—Collection of moneys by.**

The granting a *quo warranto* being discretionary, it was refused, without costs, on an application against the

Mayor of Fredericton, on the ground that he was disqualified from holding the office, by reason of his having improperly held money in his hands belonging to the City ; no corrupt motive being charged against him, the amount being small, and the object of the relator in making in making the application, not free from suspicion. *Ex parte Torrens*, 2 *Han.* 196.

*Semble*, That the 8th section of the 22 Vic. cap. 8, and the 2nd section of 32 Vic. cap. 87, do not apply to moneys collected by the Mayor as fines imposed for violation of the City bye-laws. *Ibid.*

#### **8—Sale of right to collect market tolls,**

A sale by the Corporation of Fredericton of the right to collect market tolls for a year, is not illegal under the City Charter, 22 Vic. cap. 8 ; and a bond given to the City by the purchaser for the amount of the purchase money may be enforced. Such sale, being a demise of the tolls, may be by parol, though tolls are incorporeal hereditaments (Ritchie, J., *dissentiente*). *City of Fredericton v. Mulligan*, 5 *All.* 571.

#### **9—Bye-laws—Authority—Public Landings — Wharfinger—Bond.**

The charter of Fredericton authorizes the Corporation to make bye-laws. to regulate the public landings in the City, though the title to the land is held by the Justices of the County. *Ex parte Mourry*, 3 *All.* 276.

A vessel lying at a private wharf in Fredericton, but extending beyond it, and partly across a public landing, is subject to the orders of the wharfinger of the City, and the master of the vessel is liable under the City bye-laws for disobeying such orders. *Ibid.*

By the 48th section of the Charter of Fredericton, "No person shall be capable of acting as wharfinger until he shall have entered into a bond to the City, with two sufficient sureties to be approved of by the City Council, in such form as the Mayor shall approve," &c. A Wharfinger was appointed in April, and gave a bond which was approved by the Mayor : *Held*, in a prosecution for dis-

obeying the orders of the Wharfinger, That having performed the duties of the office for two months without objection, the approval of the bond by the City Council might be implied. *Ibid.*

*Quere*, Whether the giving or approval of a bond were necessary preliminaries to any legal act by the Wharfinger. *Ibid.*

The office of Wharfinger being annual, the liability of his sureties ceases at the end of the year for which he was appointed, and is not revived by his re-appointment. *Ex parte Mowry*, 3 *All.* 276.

#### **10—Leasing land—Giving New Lease—Auction.**

The Act 10 Vic. cap. 7, empowering the Justices of York to lease certain lands at auction, provided that no lease should be made unless the upset price or rent should have been previously fixed by the Justices, and after such land should have been sold, or once offered for sale at public auction, after ten days notice. The right of the Justices having been transferred to the Corporation of Fredericton, they agreed to lease to A. who died before executing the lease owing rent; the land was afterwards advertised to lease by auction, but before the sale the defendant agreed to take a lease on the same terms that A. held it, and pay the arrears of rent, for which he gave his promissory note. *Held*, That the Corporation had no authority to lease the land except by auction, and that the defendant was not liable on the note. *City of Fredericton v. Lucas*, 3, *All.* 583.

*Semble*, [per Parker, J.] That though the land had been *once* leased by auction, on the expiration of that lease the Corporation was bound to offer it again at public auction before giving a new lease. *Ibid.*

#### **Power to Contract for building Market House.**

*See* Corporation 13.

#### **License—Right to grant.**

The Act. 38, cap. 89, authorising the Mayor of Fredericton to grant to any person wishing to engage in any

trade, profession occupation or calling in the city, a license to engage therein is not *ultra vires* as being an interference with trade and commerce. A commercial traveller is engaged in an "Occupation," or "calling" and therefore comes within the Act. *Ex parte Fairbairns*, 1 P. & B. 4.

**Freight.**

*See Lien.* Shipping Law.

**Freehold.**

*See* Fixtures.

**FRIVOLOUS DEMURRER.**

**Power in Court to set aside.**

*See Petty v. Hammond*, 3 Kerr 684.

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**GAMBLING.**

**Statute of Maine—Horse racing.**

*See* Statute 6. *Bailey v. McDuffee*.

**GARNISHEE PROCESS.**

*See* Attachment.

**GENERAL ASSEMBLY.**

**Election of Members—Return of.**

*See* Election Law.

**Powers—Privileges.**

*See* Arrest.

**GENERAL AVERAGE.**

*See* Insurance.

**GENERAL ISSUE.**

*See* Pleading II. 24, Evidence XIII.

**GERMANTOWN LAKE.**

*See* Commissioners.

**GIFT.**

*See Donatio Mortis Causa.*

**Parol gift of land—Married woman—Discontinuance.**

Where there was a parol gift of land to a married

woman, and the property was actually occupied by the husband of the donee and worked by him—she residing with him as his wife—*Held*, That the wife could acquire no title by such a possession either against her husband or the donor—the title acquired by such would be the title of the husband.

*Quere*, Whether a party gives land to another by parol and puts him in possession, this might not be considered a discontinuance of the owner's possession, and the statute of limitations begin to run at once and not at the end of the year. *Doe dem. Vincent v. Murray*, 2 *Pug.* 375.

#### **GIVING TIME.**

*See* Bond II. 33.

#### **GLEBE.**

*See* Church of England.

Corporation. Trespass I. 8.

#### **GOOD FRIDAY.**

*See Dies Non.*

#### **GOODS SOLD.**

*See* Assumpsit (e)

#### **Government contractor—Powers of—Liability.**

*See* Replevin 28. *Davidson v. King.*

Negligence 6. *Craig v. Chisholm.*

#### **Government officer—Liability of.**

*See* Action at Law IX. 29.

A servant of the crown is liable for his own wrongful acts. *Morton v. Bartlett*, 2 *Pug.* 215.

#### **GRAND JURY.**

*See* Criminal Law.

#### **GRANT.**

*See* Crown Grant.

#### **GRIEVOUS BODILY HARM.**

*See* Criminal Law.



**GUARANTEE.**

- I. CONSIDERATION.
- II. OPERATION OF STATUTE OF FRAUDS.
- III. CONSTRUCTION MUST BE STRICTLY PURSUED.
- IV. PARTIES' INTEREST—RIGHT TO SUE.

## I.

## CONSIDERATION.

**Consideration not appearing by the agreement.**

*See* Pleading I. 6.

**1—Consideration not inferred from terms of guarantee.**

The plaintiff agreed to advance money to D. T., to enable him to get logs, on receiving security for the delivery of the logs: the defendant having agreed to become security, an agreement for the delivery of the logs by D. T., and payment thereof by the plaintiff was signed by them, and the defendant then wrote upon the agreement and signed the following memorandum: "I guarantee the performance of this contract on the part of D. T.;" and the agreement was then delivered to the plaintiff. *Held*, That no consideration for the defendant's promise could be inferred from the terms of the guarantee; and that the same rule would apply, whether the guarantee was written on the same paper with the agreement, or on a separate paper referring to it. *Aiton v. Balloch*, 4 All. 321.

2—An agreement in writing was made between the plaintiff and one D., whereby the plaintiff was to deliver 600,000 feet merchantable spruce logs, at certain times and places, for a certain specified price per thousand; the logs to be surveyed by one W.A., by Emery's table; and at the foot of the agreement was the following memorandum, signed by the defendant at the same time that D. signed it: "I guarantee the above payments to John S. Taylor" (the plaintiff). *Held*, That there was a sufficient consideration expressed by reference to the agreement. *Taylor v. Harris*, 2 Kerr 343.

*Held* also, That the whole of the 600,000 feet not having been delivered, and the survey of part of the logs which

were delivered not having been made by W. A., the defendant was not liable on his guarantee. A surety is entitled to a strict performance of the contract which he guarantees, and any deviation made without his assent discharges him. *Ibid.*

3——— A writing by defendant in the following words: "We guarantee that the wages due W. K. and G. N., from J. H., for making timber shall be satisfied when they bring the timber up, according to their own arrangements," shews a sufficient consideration of forbearance by W. K. and G. N. to sue for their wages till the timber was brought up. (*See Act 23 Vic. cap. 31.*) *Neville v. Joseph, Hil. T. 1832.*

4——— The rights of W. K. and G. N. for wages, being separate and distinct—*Held*, That each might sue separately on the guarantee. *Ibid.*

5——— A guarantee in the following words:—"We hereby guarantee to you the payment of £50, by J. G., in three years from this date," shews a sufficient consideration on the face of it. *Johnston v. Fraser, Mich. T. 1832.*

## II.

### OPERATION OF STATUTE OF FRAUDS.

1——— Where a bill of sale, by way of mortgage of certain cattle, was given by B. to A., which were to be delivered on a future day in case B. failed in payment of a promissory note, and a written collateral guarantee given by the defendant to A. to secure such delivery: *Held*, That such guarantee not stating the consideration on which the same was made, is invalid under the statute of frauds. *Marks v. Scott, 2 Kerr 638.*

(*See Act 23 Vict. cap. 31.*)

2——— C. was getting timber for defendant under a contract, and being in want of hay, sent a message to him to that effect. Defendant said to the messenger "You can tell C., or any one that will supply him with hay, that I will accept C.'s order payable in the spring." This message was communicated to the plaintiff, who afterwards supplied C. with hay. *Held*, in an action for goods sold

and delivered, That the defendant's undertaking was either collateral, to answer for C.'s debt, or an agreement to accept an order from C. for the value of the hay; and in either case the plaintiff could not recover. *Semble*, That it was a guarantee. *Cohrell v. Hatfield, Trin. T. 1831.*

### III.

#### CONSTRUCTION MUST BE STRICTLY PURSUED.

1 ——— Where the defendant undertook, in writing, that if the plaintiff would advance to one T. H. C. to the amount of £1000, he would guarantee that T. H. C. paid the plaintiff £500 in the month of July next; and the plaintiff advanced £281, and was ready to advance the remainder if T. H. C. would have received it. *Held*, That the defendant was not liable to any extent on his guarantee, as he only agreed to be responsible if the advances amounted to £1000. The contract of guarantee must be strictly construed. *Thorne v. Carman, 2 Kerr, 381.*

#### 2—When an Absolute Contract.

The defendants entered into a written contract with T., by which he was to deliver them a quantity of lumber at a certain time. They afterwards agreed with the plaintiff to transfer to her the balance of lumber coming from T., for which they acknowledged to have received payment in full from the plaintiff, and guaranteed to see the lumber delivered at the time specified in the agreement with T. *Held*, That this was an absolute contract by the defendants to deliver the lumber, and not a guarantee that T. should deliver it, and that the plaintiff had nothing to do with T.'s contract except to ascertain the time of delivery. *Lindsay v. Rose, 3 Kerr 576.*

#### 3—Contract—Delivery of Shingles—Quality—Liability.

In March 1871, P. agreed to sell and deliver to plaintiff all the sawed cedar shingles his mill manufactured during that season, to be paid for on delivery, at certain rates, according to quality. The plaintiff at the same time made an advance of \$500 to P. on the contract, and the defendant agreed as follows: (all being written on the same

paper,) "I guarantee to D. G. (plaintiff,) that on or before the 10th May next, P. will deliver to him sufficient sawed cedar shingles at the rate specified in the within contract, to make good to him the above advance of \$500; he failing to do so, I hereby hold myself liable to said D. G. for the sum of \$500, or such portion of said advance as may be due, it being understood that I am to get credit for whatever portion of shingles may be delivered by said P., supposing the amount does not come to \$500." P. delivered a quantity of shingles, some under the contract, (but not to the amount of \$500) and some of a different description and under a separate contract of which the defendant had no knowledge. *Held*, in an action on the guarantee, That the defendant was only entitled to credit for such shingles as P. had delivered of the description and quality described in his contract with the plaintiff, and not for *all* the shingles delivered; and that the plaintiff was not bound to give notice to the defendant that P. was not fulfilling his contract. *George v. Brayley, Hil. T. 1873.*

## IV.

**PARTIES' INTEREST IN GUARANTEE—RIGHT TO SUE.**

*See* Agreement 8.

A guarantee by one partner in the name of the firm for a matter not relating to the partnership business, will not bind the firm. *Marks v. Wright, Hil. T. 1828.*

*See Supra. Neville v. Joseph I. 4.*

**GUARDIAN IN SOCAGE.****Widow holding possession for heir.**

*See* Possession 4.

**GUEST.**

*See* Boarding House Keeper.

**GUN POWDER.**

*See* Revenue Act.

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**HABEAS CORPUS.**

**Proceedings issuing after habeas corpus to remove cause—Irregularity in writ of—Setting aside proceedings.**

*See Practice VI. 46.*

**HALF BLOOD.**

The half brothers and sisters of a person who dies intestate and without children, are not entitled to the whole real estate, under the Act of Assembly 26 Geo. III. cap. 11; but as "the next of kin," they are entitled to the remainder of the estate after the portion of the heir at law is deducted. *Doe v. Troughton*, 3 All. 414.

If no heir at law can be found, *quære*, in whom will this portion of the estate vest? *Ibid.*

The person entitled as heir by the common law, is not excluded under the Act, though he is not one of the next of kin to the intestate; neither are the next of kin prevented from taking the *remainder* because they are not in equal degree with the heir, but nearer in degree. *Ibid.*

**Intestate leaving sisters of the whole blood and a sister of half blood.**

The half sister of a person who dies intestate and without issue, is entitled to an equal share of the real estate of the intestate with the sisters of the whole blood under the Act 21 Vic. cap. 26, (Consol. Stat. cap. 78.) *Doe dem Shannon v. Fortune*, 3 Pug. 259.

**HARBOUR MASTER.**

**Appointment of.**

*See Appointment of Officer 1.*

**Recovery of Fees.**

*See Assumpsit III. 33.*

**HEIR.**

*See Half Blood.*

**Widow holding for heir.**

*See Possession 4.*

**Right of entry suspended until death of tenant by the Courtesy.**

*See Reed v. Burchill*, 2 All. 168.

**Ejectment by, without previous demand of possession.**

See Ejectment 13. *Doe dem. Murray v. Murray.*

**HEIR AT LAW.****1—Intestate without children.**

If A. die intestate and without children, leaving a brother, and two sisters, the brother as heir at law will be entitled to a double portion or two-fourths of the real estate of A. in this Province, under the Act of Assembly 26, Geo. III. cap. 11, sec. 12, and the sisters to one-fourth each. The words in the Act do not confine the double portion to the eldest son or lineal heir, but extend to collaterals. *Doe dem. Thompson v. Allanshaw*, 1 Kerr 84.

**2—Advancement.**

Under the Act of Assembly 26 Geo. III, cap. 11, the eldest son and heir at law of an intestate must bring into hotchpot his advancement of the realty, as well as the younger children, if he seek a portion of the real estate left by the father. He will be entitled to two shares or a double portion of the aggregate of what has been advanced and left—per Botsford, Carter and Parker, Justices; Chipman, C. J., *dissentiente*. *Doe dem. Shore v. Saunders*, 2 Kerr 18.

**3—Next of Kindred.**

If a person dies intestate and without children, leaving a mother and brother and sisters, the brother and sisters are entitled to his real estate under the Act of Assembly 26 Geo. III., cap. 11, sec. 12, as “the next of kindred in equal degree,” to the exclusion of the mother. *Doe dem. Mahoney v. Crane*, 3 Kerr 228.

The eldest brother is entitled to a double share, as heir at law, *Ibid.*

(See Half Blood.)

**4**——The law of descent in this Province has not been altered by the Act 21 Vic. cap. 26, (Consol. Stat. cap. 78,)—except as to the double portion of the heir at law—

and if a person dies intestate and without children, leaving a father and brothers, the brothers are entitled to his real estate, to the exclusion of the father. *Wetmore v. Wetmore*, 3 *Pug.* 413.

#### **5—Advancement.**

Where the intestate in his lifetime, gave his daughter £1000, the same was held to be an advancement which ought to have been taken into account in making a distribution of the estate. *In re Fords Estate*, 1 *P. & P.*, 551.

*See* Surrogate Court—Same case.

### **HIGHWAYS**

(*See* Justice of the Peace.)

#### **1—Saint John Highway Act—Confirming roads—Obstructions—Non-user.**

The Saint John Highway Act 50 Geo. III, cap. 16, sec. 8, confirms all highways used as such, to the extent and width to which they were originally laid out; and a party is liable for placing an obstruction within the limits of the road as laid out, though that part of it has never been used as a road by the public. *Rex v. Bennett*, *Mich. T.* 1825.

#### **2—Road through private property—User.**

A road through private property (parallel to a public road, as laid out and recorded but opened through the whole distance), is not deemed a highway, nor dedicated to the public, though it had been used for twelve years by persons having occasion to travel in the direction to which the public road extended. *Rev v. Vail*, *Mich. T.* 1826.

#### **3—Presence of Justices at assessment.**

The Justices who issue the warrant to summon a jury to lay out a private road, under the Act 50 Geo. III, cap. 6, sec. 12, must be present at the assessment of the damages. *Pitt v. Lawson*, *Hil. T.* 1827.

#### **4—Corporation of St. John—Obligation—Indictment.**

The Corporation of St. John being bound by public law to repair the highways in the city, it is not necessary, in an indictment for not repairing, to set forth the particular ground of the obligation. *Rex v. the Mayor &c. of St. John*, *Hil. T.* 1828.

**5—Proceeding for alteration of road.**

A proceeding under the Act 50 Geo. III, cap. 6, to obtain an alteration of a road, must be continuous proceeding; therefore, if a proceeding on one application fails, there must be a new application of freeholders for a warrant to summon another jury. *Rex v. White, Commissioner of Waterborough, East. T. 1831.*

**6—Laying out—Return of Commissioners not evidence of.**

A road must be laid out before it is recorded: the return of the Commissioners of Highways is not evidence of the laying out of a road under the Act 50 Geo. III, cap. 6. *Rex v. Sterling, Ber. 22.*

**7—Neglect of Commissioners to file return—Laying out not invalid thereby.**

The laying out of a public highway by Commissioners, under the Act 5 Wm. IV, cap. 2, does not become invalid by the neglect of the Commissioners to file a return of the laying out with the Clerk of the Peace, as directed by the Act. *Brown v. McKeel, 1 Kerr 311.*

**8—Trespass—Justification—Width of road.**

The defendant in trespass pleaded that the *locus in quo* had been laid out and recorded as a Public road, three rods wide. *Held*, No justification; the Act requiring that no public highway should be laid out of less width than four rods. *Perlee v. Dibblee, 1 Kerr, 514.*

**9—Conviction—Obstruction—Place.**

A conviction for obstructing a highway, is bad, unless it appears on the face of it that the place where the alleged obstruction took place was a highway. *Reg v. Brittain, 2 Kerr 614.*

**10—Certainty of description—Laying out.**

The record of a road laid out by Commissioners under the Act 5 Wm. IV, cap. 2, should so describe the road that a person going on the land with the return, may be able to ascertain and trace the road; and if the return does not point out the width of the road, or if it does not



appear whether the line described is to be the centre, or the side of the road, it is defective. *Boynington v. Holmes*, 3, *Kerr* 74.

*Semble*, That making one line on the ground may be a sufficient laying out, if it appears how the width of the road is to be formed in reference to such line. *Ibid*.

#### **11—Intended alteration—Objecting Parties—Notice.**

Where the proceedings of Commissioners in altering a road under the Act 5 Wm. IV, cap. 2 were objected to, whereupon the inhabitants applied to two Justices to obtain a warrant for a jury. *Held*, That no notice was necessary to be given to the objecting parties of the time and place of the jury's meeting to inquire into the intended alterations. *Reg v. Commissioners of Highways for Johnston*, 3 *Kerr* 583.

#### **12 — Justice Presiding — Relationship — Summoning Jury—Parish.**

It does not render a Justice incompetent to preside at an inquest of a jury summoned under the Highway Act, that he is married to a sister of the party applying for an alteration of the road : nor is it necessary that the jury should be summoned from a different Parish from that in which the alteration is to be made. *Ibid*.

#### **13—Dedication—User.**

Dedication of a road to the public may be presumed from long uses and the expenditure of statute labour on the road ; and a party may be convicted under the Act 5 Wm. IV, cap. 2, for encroaching on such a road, as upon a highway, duly laid out under Act. *Reg v. Buchanan*, 3 *Kerr* 674.

#### **14—Title to Land—Justice of Peace—Trial.**

If in a prosecution before a Justice of the Peace, under the Act 5 Wm. IV. cap. 2, for obstructing a highway, the title of land comes in question, it must be gone into by the Justice if he entertains the suit. *Ibid*.

#### **15—Removal of Fence—Commissioner's duty.**

If a road is laid out over land on which a fence is standing it is the duty of the Commissioner of Highways to

move the fence, and the owner of the land, omitting to do so, is not punishable under the Act 5 Wm. IV. cap. 2 for obstructing the highway. *Ex parte Morrison*, 1 All. 203.

**16—Dedication—Evidence.**

A public highway may be established in this country by dedication and user ; but if the question arises between the public and the owner of the land in a newly settled part of the country, stronger evidence may be required than in a more populous neighborhood. *Reg. v. Deane*, 2 All. 233.

**17—Crown Reservation—Right—Evidence.**

Land was granted to the Corporation of St. John in 1785, reserving a right to the Crown to enter at any time and erect barracks, batteries, &c. *Held*, 1st. That this did not prevent the Corporation from dedicating a part of the land to the public for a highway ; 2nd. That neither the running of lines across the land by officers of the Royal Engineers in 1816 and 1818, without proof of their instructions, nor the subsequent erection of a gate across the road by the military authorities, and occasionally closing the same, was sufficient evidence of the exercise of the reservation to vest the exclusive right to the land in the Crown, the road having from that period been constantly used by the public, and by the Military only as a road. *Ibid.*

**18—Record—Certainty—Entry of Commissioner or Surveyor.**

The record of the laying out of a road under the Highway Act 12 Vict. cap. 4, should state the width and courses of the road ; and if defective in these particulars, it will not justify the Commissioner and Surveyor of roads in entering on land to open a road. *Basterache v. Atkinson*, 2 All. 439.

**19—Expenditure of Public Money—Extent.**

The expenditure of public money on a road laid out thirty feet wide, can only make it a public highway to that extent, and will not have the effect of making it a highway four rods wide. *Ibid.*

**20—Assessment of damages—When made—Instance of owner.**

The assessment of damages to a person through whose improved land a public road is laid out under the Act 13 Vic. cap. 4, need not be made concurrently with the laying out, but may be subsequent to it. If made before the road is laid out, it is a nullity. It should be made at the instance of the owner of the land, and not of a person applying for the road. *Ex parte Hebert*, 3 All. 108.

**21—Warrant to summon Jury—Direction—Delivery.**

The warrant to summon a jury should either be directed to a particular constable, or, if generally, "to any constable," should be delivered by the Justice who issues it to some particular constable to execute, and not left with the party applying for the jury to select a constable. *Ibid.*

**22—Assessment on view.**

The jury may assess the damages on view of the land, without examining witnesses, if none are produced. *Ibid.*

**23—Levy of Damages.**

The Sessions cannot order the damages assessed by the jury to be levied upon the inhabitants of part of a Parish unless the Commissioners recommend it. If the Commissioners recommend the assessment to be levied on a certain district, under sec. 9 of the Act, they must name the persons to be assessed, and must include all the resident rateable inhabitants within the district. *Ibid.*

**24—Return to Sessions.**

*Semble*, That the Commissioners may amend their return to the Sessions before an order made to levy the assessment. *Ibid.*

**25—Assessment set aside—Application de novo.**

If an assessment is set aside for irregularity in the proceedings, the owner of the land may apply for a warrant and assessment *de novo*. *Ibid.*

**26—Damages—Value of Land—Keeping up fences.**

In assessing damages under the Highway Act, to the owner of improved land in consequence of a public road

being laid out through it, the jury are not confined to the value of the land, but may take into consideration the expenses of keeping up fences. *Reg. v. Justices of Kent*, 3 *All.* 118.

**27—Excessive Damages—Refusal to set aside.**

Where the quantity of land taken was two acres, and the jury awarded the owners £75 damages, the Court refused to set aside the award, though it was sworn the land was not worth more than £5 per acre, and that some of the jurors had stated they gave the high damages to prevent the road being opened. *Ibid.*

**28—Order of Sessions—Levy—Damages.**

Where the jury recommended that the damages should be levied upon a certain part of the Parish in which the road was, and the Commissioners sent the assessment to the Sessions, requesting that it might be "dealt with according to law," but not stating their opinion that the road was only for the convenience of a portion of the Parish: *Held*, That the Sessions were warranted in ordering the amount to be levied on the whole Parish. *Ibid.*

**29—Recommendations of Commissioners not binding on Justices.**

The Justices are not bound by a recommendation of the Commissioners that the damages should be assessed upon a certain district. If they disagree with the Commissioners, *quære*, whether they have power to assess the whole Parish. An order of the Justices to assess the amount of damages awarded by a jury, is a sufficient order for the payment. *Ibid.*

**30—Dedication of Crown.**

To establish a highway by dedication of the Crown, the particular land must be expressly reserved in a grant from the Crown, or be defined in the plan of a grant containing a reservation of roads. *Cole v. Maxwell*, 3 *All.* 188.

In the absence of any evidence of a plan attached to an ancient grant of land "*with allowance for roads*," by which a particular part of the land is dedicated as a highway, and

without any use of such road by the public, a dedication by the Crown will not be presumed, though several of the old proprietors of lots in the grant spoke of a *planned road* over the land, and one of them caused the lines of the supposed road to be marked on his land about 40 years before the trial. *Ibid.*

The declaration of the owner of the land that there was a road through it, without any proof of use or of the locality of the road, does not amount to a dedication of it to the public. *Ibid.*

In trespass to land and ploughing up the soil, defendant pleaded that there was a public highway over the land, by reason whereof he entered. *Held*, That if it was a highway, ploughing up the soil was not justified. *Ibid.*

### **31—Recording as laid out—Commissioner's duty.**

When Commissioners of Highways have laid out a road it is their duty to record it as laid out. They have no right to abandon a part of it, and make a return of the other part. *Ex parte Weade*, 3 *All.* 307.

### **32—Shutting up road—Necessary return before.**

To justify the shutting up a highway under the 1 Rev. Stat. cap. 66, the return of the Commissioners must shew, either expressly or by necessary implication, that the road is not required for the convenience of the inhabitants of the parish. The words "not required for the inhabitants," and "not required for the convenience of the inhabitants" are not identical in meaning. *Oulton v. Carter*, 4 *All.* 169.

### **River—Obstructing use of as highway.**

*See* Action on the Case IV. 1.

### **Erection of dam in public stream—Destruction of same by persons not injured—Injunction to restrain.**

*See* Water Course.

### **Laying out of Highways—Rights of Public—Evidence—Non user.**

It is not necessary for the Commissioners of Highways in laying out a street under 5th Wm. IV. cap. 2, to put up

fences or grade the road. It is enough if a man can go upon the ground with their return and plan and discover where the street is, its course, length and width.

The street having been laid out and recorded the public acquires a right in the whole extent of it, whether it is opened and used or not, and they cannot by non user release their rights over it.

The return of the Commissioners of Highways properly made and filed, is evidence of the laying out of the street- *Regina v. McGoivan*, 1 P. & B. 191.

#### **HIRING.**

A person who hires a horse to perform a journey, is not liable for the value of the horse if he dies on the road, without the fault of the hirer ; and *quære*, whether in such case, where the hiring was not by the day, the owner of the horse could recover on the *quantum meruit* for the time the defendant used the horse. *Dickie v. Campbell Hil. T. 1827.*

#### **HOLIDAY.**

**Service of papers on.**

*See Practise IV. 29.*

#### **HOMICIDE.**

*See Criminal Law.*

#### **HOMESTEAD.**

*Quære*, Whether the Homestead Act, is valid as to traders, and if so whether there is the requisite machinery for carrying it into effect when the debtor assigns under the Insolvent Act.

*Quære*, Whether a homestead can be set off when the land is under mortgage. *In re. Harrison*, 2 Pug. 11.

*See Insolvent Act. Same case.*

**Sale of whole lands under execution.**

Application must be made by the debtor or his wife to have homestead set off, otherwise Sheriff justified in selling whole lands. *Pourrier v. Harding*, 2 Pug. 120.

#### **Insolvents.**

*Quære*, Whether provisions of Homestead Act apply to the real estate of insolvents under the Insolvent Act. *Doe dem. Smith v. Snarr*, 1 P. & B. 56.

**HORSE.**

*See* Hiring—Warranty.

**HORSE RACE.**

**Money deposited upon—Stakeholder—Right to recovery back of deposit.**

*See* Action at Law I. 3.

A deposit of money with a stakeholder in this Province to abide the result of a horse race in Nova Scotia, is not an illegal transaction under the Revised Statutes, and may be recovered back, if the race is not run. *See Kenney v. Stubbs*, 4 *All.* 126.

**Betting on—Statute of Maine.**

*See* Statutes 6.

**HOUSE OF ASSEMBLY.**

*See* General Assembly—Arrest (privilege from).

**HUSBAND AND WIFE.**

I. ACTIONS BY AND AGAINST.

II. NECESSARIES.

III. SEPARATE PROPERTY OF WIFE. (Liability of, to Execution).

IV. MISCELLANEOUS.

I.

**ACTIONS BY AND AGAINST.****1—Release of action by husband.**

The husband may release an action brought in the name of himself and his wife, to recover a debt due to the wife before marriage, though she is living separate from him, and the action is brought for her benefit, and no consideration was paid for release, *McLellan v. Coughle*, 4 *All.* 237.

**2—Abatement of Action—Death of Husband.**

An action brought by husband and wife to recover money had and received to the use of the wife, does not abate by the death of the husband. *Harrington v. McManamin*, 4 *All.* 599.

**3—Action by wife alone—Husband insane.**

A married woman, whose husband is insane and confined in a Lunatic Asylum, and who is compelled to support herself by keeping a boarding house, may sue and recover in her own name, the amount due from a boarder lodging in the house after her husband's insanity, under the Rev. Stat. cap. 114, sec. 3.

The amount due from a boarder under such circumstances, vests in the wife as her separate property, and will not pass to the husband's representatives on his death. *Abell v. Light*, 1 *Han.* 97.

**4—Legacy—Husband maintaining action as representative of wife.**

If a legacy is bequeathed to a married woman, who dies before any act done by her husband to reduce it into possession, he can only maintain an action for it as the representative of his wife, though he may be beneficially entitled to it. *Collins v. Cahir*, 2 *All.* 103.

**5—Rent—Tenant dying, leaving a widow—Continuance of possession by second husband—Non-joinder of wife.**

A tenant died in possession of premises, leaving a widow. *Held*, That the defendant, who had married the widow and continued in the occupation of the premises, was liable for rent during his occupancy, and that the wife need not be joined in the action as a co-defendant. *Matthew v. Chittick*, 2 *Kerr* 696.

**6—Action for Dower.**

A widow cannot maintain an action at law for dower in land, in which her husband had only an equity of redemption during the coverture, even though the husband's right has been sold since his death, and purchased by the defendant, expressly subject to the right of dower; or, though the mortgage may have been paid, if it is not discharged on the records. *Doe v. Estabrooks*, 4 *All.* 455.

## II.

## NECESSARIES.

**7—Liability of husband for.**

The defendant turned away his wife without cause, and



afterwards offered to take her back and provide for her but she refused to return. The jury were directed that this offer did not relieve the defendant from liability to a third person, who had afterwards supplied the wife with necessaries. *Held*, per Wilmot, J., and Ritchie J., (Parker, J., *dissentiente*), A misdirection; and that the question for the jury should have been whether the defendant made a *bona fide* request to his wife to return, and if so, whether she had refused on a well-founded belief that his ill-treatment to her would be renewed. *Held* also, That the liability of the husband depended upon the implied authority of the wife, as his agent, to bind him; and that when the necessity for the authority ceased, her right to bind him ceased also. *Held*, per N. Parker, M.R., That a husband who wrongfully turns away his wife, continues liable at law for her support, except in case of her misconduct; and that the question whether she was bound to return to his home on his offer to take her back, could only be determined in the Spiritual Court, in a suit for the restitution of conjugal rights. *Bennett v. Jones*, 4 All. 397.

#### **8—Necessaries—Wife living apart.**

A husband is liable for furniture sold to his wife while living apart from him for sufficient cause, but not for money lent. *Gray v. Vesey*, 1 P. & B. 276.

### III.

#### **SEPARATE PROPERTY OF WIFE.**

9———Land was conveyed to a married woman, for life, for her separate use; it was managed under her directions, and the labor paid for by the produce of the land, the husband not interfering except as her agent. *Held*, 1st. That under the Rev. Stat. cap. 114, the crop, when severed, did not become the property of the husband, and was not liable to seizure under an execution against him. 2nd. That an action for seizing the crop, under execution against the husband, was rightly brought in the name of husband and wife. *Dow and Wife v. Dibblee*, 1 Han. 55.

10———When a husband and wife reside on land of which the wife has the fee, the husband is tenant by the courtesy, and the crops raised by his labour and the labour of his servants and children, are his and liable to seizure for his debts, and the Sheriff may enter to make a levy. In the absence of title, the possession is the possession of the husband. *Pourrier and wife v. Raymond*, 1 *Han.* 512.

## IV.

## MISCELLANEOUS.

**Infant subsequently married—Right of entry of husband.**

*See* Limitation of Actions IV. 16.

**Mesne profits—Judgment against wife before marriage—No averment of marriage.**

An action for *mesne* profits against husband and wife alleging a joint trespass, is not supported by proof of a judgment in ejectment against the wife before marriage—the marriage not being averred. *Burnham v. Watts*, 1 *All.* 89.

**Costs—Attachment against married woman.**

*See* Attachment 27.

**Deed—Joinder by wife.**

*See* Deed I. 27.

**Partition—Infancy—Long acquiescence.**

*See* Partition.

**Decree barring right of dower of wife.**

*See* Divorce.

Tenant by Courtesy. *See*

**Property passing to husband's representatives.**

*See* Supra, *Abell v. Light*.

**Wife not competent to submit by bond to arbitration.**

*See* Arbitration, &c., V. 4.

**Delivery of note to wife by husband—Delivery of box.**

*See* *Donatio Mortis Causa*.

**Release of Dower—Property subsequently acquired.**

*See* Dower.

**IDENTITY.**

*See Name—Misnomer.*

**Identity of person—Two surveyors of lumber same name—Left to jury to decide upon the evidence which of the two was intended.**

*Rankin v. Emery, Ber. 380.*

**Identity of defendant with person named in note—Sufficiency of evidence.**

*See Bills and Notes V. 16.*

**Trespass—False imprisonment—Not shewn that party was commonly known by name by which he was arrested.**

*See Pleading II. 20.*

**Judgment—Action on—Averment that the defendant and person named are the same, sufficient.**

*See Pleading I. 58.*

**Alias description—Sufficiency of proof.**

*See Pleading I. 57.*

**Judgment—Action on Quære, As to sufficiency of name of defendant, with person named in judgment.**

*See Evidence II. 29.*

**Arrest—Insufficiency of Affidavit to discharge defendant for arrest under mistaken name.**

*See Affidavit III. 5.*

**Replevin—Mistake in name of party claiming property.**

*See Replevin 21.*

**Identity of Commissioner taking deposition.**

*See Evidence IX.*

**Land—Identity—Evidence.**

Defendant, by writing addressed to the plaintiff, stated that he would "take property," and give his notes for a certain sum. Plaintiff wrote on the same paper, that he could not sell "property," but would "re-deed to H." and take notes for a certain sum, specifying the time of payment; to which the defendant agreed. Plaintiff proved that H. had conveyed to him the equity of redemption in a

certain property. *Held*, That this sufficiently identified the property referred to in the agreement; though, if necessary, parol evidence was admissible to shew what property the agreement related to. *Pugsley v. Gillespie*, Mich. T. 1872.

### ILLEGITIMATE CHILD.

#### **Liability of father for support of.**

The father of an illegitimate child is not liable to a third person for the expense of supporting such child, unless it has been incurred upon his authority; or he has contracted to pay for it. *Forrest v. McRea*, 2 Kerr 174.

#### **Grandson—Legitimate and Illegitimate Child—Same name—Devise—Operation.**

*See* Will 2.

### IMPERIAL STATUTES.

*See* British Statutes.

### IMPLIED CONTRACT.

*See* Contract.

### IMPRISONMENT.

**Imprisonment by order of a judge under provisions of Consol. Stat. cap. 38, secs. 28-36, not ultra vires.**

*See* British N. America Act 11. *Ex parte Ellis*.

**Imprisonment for default of payment of penalty ultra vires.**

*See* By-Law 8, *Ex parte Trask*.

**Insolvent Act—Party not a trader.**

*See* B. N. A., Act 6.

### IMPOUNDING CATTLE.

Under the 1 Rev. Stat. cap. 61, sec. 20, (Consol Stat. cap. 110), authorizing all cattle impounded to be sold at public auction after fourteen days' public notice—unless all charges and expenses incurred on account thereof be paid—a pound-keeper is not authorized to sell all the cattle he may have in pound, but only sufficient to meet the charges and expenses already incurred. *Dickie v. Lawson*, 2 Pug. 46.

**Power to make regulations—Appointment of officers and imposing fees.**

*See* Statute 2, same case.

**INCUMBRANCE.****Registered Memorial of judgment against vendor is evidence of incumbrance on his land.**

*See* Lien.

**Purchaser of land entitled to land free from incumbrance.**

*See* Vendor and Purchaser.

**Registry of Mortgage not a notice of an incumbrance to a subsequent purchaser.**

*See* *Doe v. Power*, 1 *All.* 271.

**INDEMNITY.****Master and owner of ship—Risks—Implied contract to indemnify—Negligence.**

*See* Principal and Agent 22.

**INDICTMENT.**

*See* Criminal Law.

**INDORSEMENT.**

*See* Bills and Notes.

**INDUCTION.**

*See* Trespass, I. 8.

**INFANT.****1—Promissory Note.**

The promissory note of an infant is voidable only, and he may confirm it, after he comes of age. *Fisher v. Jewett* *Ber.* 35.

**2—Deed—Voidable.**

The deed of an infant is voidable only; and the infancy cannot be given in evidence to invalidate the deed, in a suit between third parties. *Donohoe v. Hallett*, *Trin. T.* 1828.

**3—Avoidance by heirs.**

The conveyance of an infant is voidable only, and may be confirmed after he comes of age; but if he dies soon after coming of age, having done no act to confirm the deed, his heirs may avoid it. *Doe dem. Foster v. Lee*, *Mich. T.* 1871.

**4—Covenant not to trade.**

A covenant by an infant in an indenture of apprenticeship, that he will not carry on a trade within certain limits, is not binding on him. *Reg. v. Harris*, 1 All. 100.

**5—Conveyance to infant—Fraudulent intent—Subsequent conveyance by grantor and infant.**

Land was conveyed to an infant by direction of his father for the purpose of defrauding the father's creditors, the father having afterwards been arrested by the creditors, he and his son joined in a mortgage of the land to secure the debt. *Held*, That the mortgage was good; that the infant being only a trustee for his father, was bound to convey the land as he directed; and that neither of them could set up the infancy to defeat the mortgage. *Doe dem. Diffin v. Simpson*, 3 Kerr 194.

**6—Scire Facias on judgment—Infant not served.**

Judgment by default was signed against A. and B., on a joint and several promissory note. B. was not served with process, and on a *scire facias* against him, under the Act 26 Geo. 3, cap. 24, to obtain execution on judgment, proceedings were stayed—it appearing that at the date of the note he was an infant, and had not authorized A. to sign the note for him, and had no knowledge before the judgment of its having been done. Neither the fact of the note having been given for a balance due the plaintiff on a lumber transaction, in which A. and B. were jointly concerned; nor of B's having offered after coming of age to compromise and pay a portion of the debt, will deprive him of his right to relief. *Mitchell v. Astle*, 2 Kerr 86.

**Right of entry accruing to female infant—Marriage—Action not brought within time.**

*See* Limitation of Actions IV. 16.

**Infancy no bar to enforcing contract.**

*See* Contract 14.

**Infant apprentice—Conviction.**

*See* Apprentice.

**INFERIOR COURTS.****Taxing Costs by Clerk of Supreme Court.**

*See Costs 75.*

**Mandamus to try Cause.**

*See Mandamus 2.*

**Mandamus refused to compel Court of Common Pleas to award costs.**

*See Mandamus 7.*

**Mandamus refused to compel Magistrate to proceed in a criminal cause at suit of private prosecutor.**

*See Mandamus.*

**Prohibition to restrain action brought against Clerk of the Circuits for recovery of fine imposed.**

*See Prohibition.*

**Removal of Cause—Issue of Writ of Error.**

*See Error (Writ of.)*

The Inferior Courts of Common Pleas have no power to grant new trials, and a mandamus will issue to compel them to enter judgment for a party in whose favor a verdict has been given in that Court. *Rex v. Justices of Northumberland, Hil. T. 1826.*

The Inferior Courts of Common Pleas are Courts of Record in regard to summary actions, as well as other actions. *Wheeler v. Grant Mich. T. 1832.*

**Judgment of not conclusive.**

*See Judgment I-8, Wright v. Parlee.*

*V. 9 Jackson v. O'Donnell.*

**Removal of cause.**

*See Attorney-General.*

**INFORMATION.**

*See Justice of the Peace—Criminal Law—Crown Grant I. 18—Quo warranto.*

1———An information of debt, filed by the Attorney-General, is sufficient, though it is stated to be on the rela-

tion of the Deputy Treasurer: if such allegation is unnecessary, it might be rejected as surplusage. *Attorney-General v. Patterson, East. T. 1826.*

2—An information, alleging the offence to be the importing goods into the Province from the United States, contrary to the Acts of Assembly, does not state any offence against the Act 6 Wm. IV, cap. 4, which declares a forfeiture of all goods landed before they are reported at the Treasurer's office, and a permit obtained. The "importing" goods and "landing" them, are distinct acts. *Attorney-General v. 250 Barrels of Fish, Ber. 419.*

#### **INITIALS.**

*See Name.*

#### **INJUNCTION.**

*See Practice in Equity—Equity.*

#### **INNKEEPER.**

##### **Prohibition as to selling liquor on credit.**

The prohibition in the Act 17 Vic. cap. 15, sec. 18, against selling liquor on credit, only applies to innkeepers and tavern keepers. *McAuley v. Lawlor, 4 All. 600.*

*See Boarding House Keeper.*

#### **INNUENDO.**

*See Defamation—Pleading.*

#### **INQUEST OF OFFICE.**

*See Crown Grant I. 18,—License—Intrusion.*

#### **INQUIRY (WRIT OF.)**

*See Practice X.*

#### **INROLLMENT.**

**Statute of Inrollments is in force in this Province.**

*See British Statutes.*

#### **INSOLVENT ACT 1869 AND 1875.**

##### **1—County Court Judge—Hearing petition.**

The County Court Judge of the County in which the demand on the debtor to assign is made, is the proper party to hear the petition, although the debtor may reside and do business in another County. *See Ex parte Thomas, 2 Han. 163.*



**Removal of proceedings had before Judge of County Court not allowed.**

*See Certiorari I. 5.*

**2—Creditor—Debt not matured.**

A creditor whose debt has not matured may take proceedings to subject the estate of his debtor to compulsory liquidation under the Act, section 20. *In re Perks*, 2 *Han.* 121.

**3—Property—Third party—Claim—Attachment.**

If property claimed by a third person has been attached as the property of an insolvent, under a warrant issued under the 20th section of "The Insolvent Act of 1869," such person has no right to apply, under section 50, to set aside the attachment, or to have the property restored to him by the assignee: he must resort to his common law remedy. *Clementson v. Hammond, East. T.* 1871.

A third party cannot object to the regularity of the proceedings taken against a debtor under the Insolvent Act of 1869. *Ibid.*

**4—Execution—Setting aside—Right of Insolvent.**

Plaintiff, a judgment creditor of defendant, proved his claim before the assignee under the Insolvent Act; afterwards, and before defendant obtained his discharge, the plaintiff issued execution on his judgment, and levied upon property which the insolvent had not included in his schedule of assets. *Held*, That whether the property belonged to the defendant at the time of his insolvency, or was the property of a third person, he had no right to apply to set aside the execution, as in either case, he could have no right to it. *Jones v. DesBrisay, Trin. T.* 1871.

5—Where proceedings for compulsory liquidation are taken under "The Insolvent Act of 1869," and an attachment is issued, money which has been levied by the Sheriff under an execution against the debtor, but which has not been paid over to the Judgment creditor, passes to the assignee, under the 59th section of the Act. *Bullen v. Harding, Mich. T.* 1871.

**6—Compulsory liquidation—No petition presented—Proceedings.**

M., a creditor of defendant, made a demand upon him to assign his estate, for the benefit of his creditors, under the 14th section of "The Insolvent Act of 1869." No petition against this demand was presented within five days, as required by the Act, but after that time the defendant settled his debt with M., who took no further proceedings. *Held*, That the estate of the defendant was nevertheless subject to compulsory liquidation, and that the demand of M., enured to the benefit of the other creditors of the defendant. *Dever v. Morris*, 1 *Pug.* 270.

**7—Sections 92 and 93—Quasi penal.**

The 92nd and 93rd Sections of "The Insolvent Act of 1869" being *quasi* penal, are to be strictly construed, and to warrant imprisonment under their provisions the case must be brought within the express words of the Act. *Jones v. Bigeau*, 1 *Pug.* 334.

**8—Offer to suffer judgment—Effect.**

In an action on a promissory note made by the defendant in favor of the plaintiff, the declaration alleged fraud and false pretences in obtaining credit according to the 92nd section of the Act, the defendant pleaded the general issue and gave a notice of defence denying the alleged fraud; he also filed an offer under the Act 18 Vic. cap. 9, to suffer judgment by default for the amount of the note, which offer the plaintiff accepted. *Held*, That this was not such a judgment by default as was contemplated by the 93rd section of the Act; the acceptance of the defendant's offer having settled all the issues in the suit, and therefore no order for imprisonment could be made. *Ibid.*

**9—Transfer—Unjust preference—Pressure—Contracts with party knowing of insolvency—Construction of Act—Letters, use of on hearing an appeal in Equity.**

In 1869 W. agreed to make cash advances from time to time to B., and B. promised to give W. security on his property when W. should require it. W. made cash

advances to a large amount. In August, 1875, B. being hopelessly involved by reason of giving accommodation notes and otherwise, W., by his Agent T., after very considerable urging, obtained security for W. upon almost the entire property of B. It did not appear that W. knew the exact state of B.'s affairs, or the full amount of B.'s indebtedness, but a majority of the Court were of the opinion that W. must be considered to have known that B.'s affairs were desperate. B. gave W. a certificate of sale of the ship *Oneota* on the 17th day of August, 1872. W. sold to himself, at what was admitted to be a fair price for the ship, on the 4th Sept. following, B. confirmed the sale on the 20th Sept. following. B. made an assignment for the benefit of his creditors in November of the same year, and his assignee filed a Bill to recover back the property so transferred to W. *Held*, (by Allen, C. J., and Weldon, J., Wetmore, J., *dissentiente*,) That the transfer from B. to W. was an unjust preference, made in contemplation of insolvency, and therefore void under the 89th section of the Insolvent Act of 1869. Allen, C. J. was of opinion that the case was also within the provisions of the latter part of the 86th section of the said Act. Wetmore, J. was of opinion that the case was not within the provisions of the 86th section. *Held*, (by Allen, C. J., and Weldon, J., Wetmore, J., *dissentiente*,) That neither the previous promise of B. to give security, nor the pressure brought to bear on him by T., (W.'s agent) made the transfer good. *Held*, The transfer was not protested by the 81st section of the Merchant Shipping Act of 1854.

An Act of the Parliament of Canada must be construed according to its terms, and not by the provision of English Acts, though in many respects similar.

The words in the 89th section of the Insolvent Act of 1869, "In contemplation of insolvency," are to be construed by the *quo animo* of the grantor.

The words "unjust preference" in the same section are equivalent to the words "fraudulent preference" in

the English Bankrupt Act of 1869. By Weldon J., The word "unjust" should be construed in its natural sense, and an "unjust preference" is one that prevents an equal distribution of the insolvent's property among all his creditors. By Wetmore, J., The 89th section of the Insolvent Act 1869, is *ultra vires* so far as it operates upon property lawfully acquired by persons not insolvent. Where certain letters were referred to in defendant's answer, the Judge in Equity required the defendant to produce them for the plaintiff's inspection, and certain of them were put in evidence on the hearing, and the Judge made use of them in arriving at his judgment. By Weldon, J., That the ruling of the Judge in Equity was correct. By Wetmore, J., That at least it was no ground for appeal. If the order of the Judge in Equity was improperly made, it should have been appealed from at the time. *McLeod, Assignee, &c. v. Wright*, 1 P. & B. 68. Wright, Appellant, and McLeod, Respondent.

**10 — Fraudulent preference — Mortgage given five months before issue of attachment.**

Where a mortgage to secure an antecedent debt was given by a trader more than five months before the issue against him of a writ of attachment, under the Insolvent Act of 1869, the Court *Held*, That as the burthen of proving that the mortgage was given in contemplation of insolvency was upon the assignee of the estate, in which he had wholly failed, and as fraud was not to be presumed unless the conveyance was made within thirty days of the issuing of the attachment, the mortgage was therefore not void under sec. 89 of the Act, as being a fraudulent preference. *Ex parte Jones, Re Raymond*, 2 P. & B. 136.

**11—Contemplation of insolvency—Bill of sale of all goods to secure past debt—Bill of sale registered—Relation to delivery.**

C., a trader, being insolvent, gave to H. a bill of sale transferring all his stock in trade, goods and chattels of every description contained in his two stores, and all that he might subsequently place therein, as a security for a

past debt. C. shortly afterwards made an assignment under the Insolvent Act of 1869. *Held*, That the bill of sale was void, as it must be taken to have been made in contemplation of insolvency.

*Quære*, Whether where a bill of sale is registered before an assignment in insolvency by the grantor, it relates back to its delivery. *Pugsley, Assignee, &c., v. Hegan*, 2 P. & B. 1.

**12—Fraudulent preference—Contemplation of insolvency—Official assignee.**

A transfer of goods by a party afterwards becoming insolvent to a creditor in payment of his claim, is a fraudulent preference and void, if the necessary result of the transfer is to cause the debtor to close up his business and prevent him from paying his other creditors: and the words of the Insolvent Act, "in contemplation of insolvency," do not necessarily mean contemplation of assignment under the Act.

When an official assignee becomes the assignee of the creditors, in case there should be any defect in election, he may rely on his position of assignee by operation of law. *Marsh Assignee, &c., v. Sweeny*, 2 Pug. 454.

**13—Contestation of creditor's claim.**

In resisting a claim filed against an insolvent's estate on checks drawn by the insolvent and unpaid for want of funds, on the ground of want of presentment and notice, it is necessary to allege and shew that, by reason of want of notice, the insolvent or his estate had sustained loss or injury. *Re Oulton Brothers*, 2 Pug. 383.

**14—Replevin against assignee—Remedy—Traders—Evidence of party being.**

The holder of a mortgage on personal property belonging to an insolvent, having replevied it from the assignee, it was *Held*, That the remedy by action was taken away by sec. 50 of the Insolvent Act, and that he should have applied to the Judge for an order under that section.

In case of compulsory liquidation, the judgment of the County Court Judge adjudicating the party insolvent, is *prima facie* evidence of his being a trader. *McQuirk v. McLeod*, 2 *Pug.* 323.

**15—Arrest after assignment—Discharge.**

Where an insolvent has been arrested after assignment by a creditor who has filed his claim under the Act and taken part in the proceedings, the Court will not set aside the writ and discharge the defendant out of custody, but will leave him to his relief under the 145th sec. of the Act, by application to County Court Judge. *Hegan v. Jones*, *Jones v. Jones*, *Damio v. Jones*, 2 *Pug.* 290.

**16—Order for support—Confined Debtors' Act.**

A debtor who assigns under the Insolvent Act of 1869, cannot, if in custody, obtain an order for support under the Insolvent Confined Debtors' Act, and can receive his discharge only in the manner pointed out by the former Act. *Ex Parte Bejeau*, 2 *Puy.* 200.

**17—Memorial—Registry prior to assignment—Effect of.**

A judgment, a memorial of which has been registered, is a charge upon the real estate of the debtor, who afterwards becomes insolvent and makes an assignment under the Insolvent Act, and can be enforced against the real estate which belonged to the debtor, and was transferred to the assignee by the assignment under the Act. *Deveber, v. Austin Assignee, &c.*, 3 *Pug.* 55.

**18—Wages—Privileged Creditor.**

C. assigned under the Insolvent Act of 1869 on the 14th Nov. 1872, being indebted at the time to N. in the sum of \$945. Part of this sum was for wages due the claimant as a shipwright in the employ of the Insolvent at daily wages. The whole was settled with the Insolvent on the 28th of October, 1872, the claimant taking four notes payable in 1, 3, 6 and 9 months respectively. The last work done by the claimant was on the 8th of August, 1872, after which time he continued boarding the Insolvent's men up to the 24th October. The claimant swore that the sole reason he

left his employ was because he would not pay him. *Held*, That, in the position the claimant placed himself he could not be considered in the employ of the Insolvent, and was not entitled to be preferred as a privileged creditor under the 67th sec. of the Act. *Ex parte Napier*, 2 *Pug.* 300.

**19—Servant's Wages—Privilege.**

A servant who left his master's employ three months before the assignment of the latter under the Insolvent Act of 1869, is not entitled to be privileged under sec. 67 of the Act, even though he was obliged to leave the employ because he could not get his pay. *Ex parte Napier*, 3 *Pug.* 134.

**20—Set-off—Purchase of claim for purpose of—Knowledge of insolvency—Evidence of.**

Where a claim against an Insolvent is purchased by a debtor for the purpose of set-off, it is his knowledge of the Insolvent's being unable to meet his engagements, and his intention in purchasing—not that of the seller—which prevents the set-off from being available.

The 91st section of the Insolvent Act of 1869, relating to set-off, applies to the transfer of any debt sought to be set-off, whether it was actually payable or not at the time of the assignment.

In an action brought by the assignee of the Insolvent, where the defendant sought to set-off a note purchased by them prior to the assignment, a demand of assignment made on the Insolvent by the holder of the note prior to the transfer, was held properly admitted to shew the insolvency of the debtor at the time. *McLeod Assignee v. Denville et al.* 2 *Pug.* 422.

**21—Affidavit—Holder of note not prosecuted—Attachment—Facts necessary to be stated—Filing order.**

Proceedings in insolvency by attachment may be taken by the holder of a promissory note payable at a particular place, though the note has not been presented; but even if the want of allegation of presentment in the affidavits should be any ground for setting aside attachment, the statement of a promise to pay would make the objection of no avail.

The affidavit must state facts shewing that the defendants' estate has become subject to compulsory liquidation; mere hearsay is not sufficient.

It is not necessary that the judge's order for attachment should be filed before the writ of attachment issues.

It is not necessary to state defendant's residence and description in the body of the affidavit—it is enough if it appear in the title of the cause in affidavit for attachment. *Colwell v. Robertson*, 1 P. & B. 481.

**22—Setting aside attachment.**

An application to set aside an attachment for defect in the affidavit on which it is granted must be by petition under the 18 sec. of the Insolvent Act of 1875 as amended by the 39 vic. C., 30 sec. 3. *Ibid.*

**23—Service by publication—Appearance.**

Where a writ of attachment cannot be served personally, and an order is made for service by publication in *Gazette* for one week, it seems the defendant has that week during which he may appear. *Ibid.*

**24—False pretence—Sec. 92—Application of.**

An allegation that defendants having funds in their hands belonging to S. for goods sold on his account, had accepted a bill of exchange drawn by S. for the amount in favor of plaintiffs at sight, that when plaintiffs presented the bill to defendants on the 9th September, they falsely pretended in order to obtain a further term of credit for payment of the bill that the said goods against proceeds of which said bill had been drawn, had not yet been sold, and that plaintiffs on the strength of this representation extended the payment till October 1st; that defendants at that time knew they were unable to meet their engagements, but concealed from plaintiffs their inability to do so with intent to defraud plaintiffs, was held not to shew a fraud within the term of section 92 of Insolvent Act of 1869, and that a plea of discharge of defendants under the Act was an answer to an action brought on said bill of exchange. *Jones v. Hanford*, 2 Pug. 467.



**25—County Court Judge—Power to make orders—Appeal.**

A County Court Judge acting under the Insolvent Act having made an order that defendant, the assignee of the estate of H. L. to pay plaintiff's assignee of the estate of A. L. the proceeds of the sale of a lease which A. L. had assigned to H. L., and which defendant contended was void. *Held*, That the Judge had the power under 50th Section of Act of 1869 to make such order, the parties having agreed that the proceeds should be held subject to his order, and that it was not necessary to decide whether the Act gave him power to order the assignment to be set aside. *Held also*, That an appeal lay from such an order to the Supreme Court. *Skinner Assignee, etc., v. McLeod*, 2 *Pug.* 131.

**26—Appeal—Necessary preliminary steps.**

A party appealing from the decision of a Judge of the County Court under section 83 of the Insolvent Act of 1869 is bound to shew that all the necessary preliminary steps have been taken. *Held also*, per Weldon, J., Duff, *dubitante*, and Wetmore, *diss.*, that without proof of the necessary preliminary steps being taken the Court had no jurisdiction over the case, and no power to make any order with reference to it. *Hamilton v. Burgeois*, 2 *Pug.* 232.

**27—Deed of Assignment—Necessity of being in duplicate—Insurable interest.**

A deed of assignment was executed by a debtor under the Insolvent Act of 1869, in the form prescribed, but not in duplicate, neither was it registered. *Held*, per Allen, C. J., and Fisher and Duff, J. J., Wetmore, J., *dissentiente*, That to make the deed effectual to pass the title to real estate under the Insolvent Act of 1869, it should have been in duplicate, and that, not having been executed in duplicate nor registered, or livery of seisin given the title remained in the debtor. Per Weldon, J., Whether the official assignee could or could not have taken possession under such a deed, he not doing so, and the debtor remaining in possession, the latter had such an insurable

interest as would enable him to recover upon a policy of fire insurance. *Parlee v. Agricultural Insurance Company*, 3 *Pug.* 476.

**28—Leasehold property—Unexpired term—Vesting of  
—Rent—Liability of Assignee—Creditor.**

In February, 1873, plaintiff leased a wharf and warehouse to S., for the term of five years, from the 1st January, 1873, at annual rent of \$4,800, payable quarterly on the first days of April, July, October, and January. The lease contained a covenant, that the lessee would not assign, underlet, or part with the demised premises by his own act or deed, or by act or operation of law, without the lessor's written consent; and there was a proviso for re-entry in case of non-payment of rent, or failure to keep any of the covenants in the lease. The lessee entered under lease and occupied till October 12th, 1875, when he became insolvent, and assigned under the Insolvent Act of 1875, to the defendant as official assignee. At the time of assignment the sum of \$1,800 was due plaintiff from S. for rent due on the 1st October preceding. The property was of less value than the rent reserved. Defendant, as assignee, collected wharfage for the use of the demised premises from 13th October, 1875, to January 29th, 1876, to amount of \$488.00, which was all the property yielded during that time. This was the only act defendant did in reference to the property, except giving notice to plaintiff on December 24th, 1875, by directions of the Inspectors, that they (the inspectors) intended to retain the property only up to the end of the then current year 1875, and that on December 31st, the lease would be surrendered, and the possession of the property given up to him. Plaintiff refused to accept the surrender at the time notified, but did so on 1st April, 1876. On January 29th, 1876, defendant sold the estate of the Insolvent *en bloc* to H., and executed to him a deed on that day, which conveyed to H. "all the estate and effects, both real and personal, of every nature and kind whatsoever of the Insolvent, which came to the possession of the said M. (defendant) as

assignee," etc. . *Held*, 1st. That the unexpired term in the lease vested in the defendant, by the assignment under the Insolvent Act. 2nd. That plaintiff was only entitled to rank as a creditor on the estate of the Insolvent, for the amount of rent due at the time of the assignment on the 12th October. 3rd. Per Allen, C. J., and Wetmore, J., That plaintiff was entitled to recover from defendant the quarter's rent due 1st January, 1876; but not for the period between that and the 27th January, when he assigned to H., because the current quarter's rent cannot be apportioned. But, per Weldon and Fisher, J. J., That the defendant did not incur any personal liability to pay the rent. 4th. Per Allen, C. J., and Fisher and Wetmore, J. J., That H. was liable to plaintiff for the quarter's rent due on the 1st April, 1876, at which time H. was Assignee of the Tenu. But, per Weldon, J., That H. was not personally liable to pay rent, unless he did some act to recognize the tenancy, or take possession of the property contained in the lease. *Robertson v. McLeod, Assignee, &c.* *Robertson v. Haley*, 1 P. & B. 15.

**29—Trial of offences—Special or common jury.**

An indictment for offence under Act of 1869, after the Act of 1875 came in force, a special jury is not requisite, the Act of 1875 supersedes Act of 1869, and summoning of Jury is matter of procedure under Act of 1875, which does not require a special jury to be summoned. *Regina v. McLean* 1 P. & B. 377.

**30—Book debts—Necessary to insert in statement of insolvent.**

If an Insolvent has book debts owing to him, however small, he is bound to insert them in his statement, and if he omits to do so with intent to defraud his creditors, he is guilty of a misdemeanour. *Regina v. McLean* P. & B. 377.

**31—Enforcing claim against Assignee—County Court Judge's power as to—claim must be in nature of a debt.**

The provisions of sec. 125 of the Insolvent Act of 1875, only apply to the enforcement of a claim against the

assignee in the nature of a debt, for which the creditor holds some of the securities mentioned in the section ; therefore a County Court Judge has no power to determine that a deed to the Insolvent which is absolute on its face, was intended as a mortgage, and to order the assignee to reconvey on being paid the amount due. The grantor's only remedy is in equity. *Ex parte Danville—Re Travis* 1 P. & B. 337.

**32—Homestead—Application to set-off same—Power of C. C. Judge—Land under mortgage—Ultra vires.**

By an Act passed by the Legislature of New Brunswick, 31 Vic. cap. 25, it is provided that the family homestead of every head of a family to value of \$600, shall be exempt from levy or sale under execution and provision is made for setting-off the homestead in case of a *fi. fa.* in the Sheriff's hands.

Section 10 of the Insolvent Act of 1869, provides that nothing shall pass to the assignee which under any Act of a Legislature is exempt from seizure and sale under execution.

Harrison and Potter both became insolvent, and by two several deeds assigned their estates to the official assignees. At the time of the assignment each was possessed of a house and land on which he resided, each being under mortgage, but the equity of redemption exceeding in value six hundred dollars in each case. The assignees having advertised the properties for sale, and refusing to comply with an application of the insolvents to have a homestead set-off to them, they petitioned the County Court Judge who has jurisdiction in matters in insolvency for an order directing the assignees to comply with such requests. The judge having ordered the sales to proceed, and the proceeds to the amount of \$600 to be handed over to each of the Insolvents. *Held*, That the Judge had no power to make such an order.

*Quere*, Whether the Homestead Act is not *ultra vires* traders, while good as to non-traders. Whether, even if the homestead Act is valid as to traders, there is the requisite machinery for carrying it into effect, where the debtor assigns under the Insolvent Act.

Whether a homestead can be set-off when the land is under mortgage. *In re Harrison, In re Potter*, 2 *Pug.* 11.

**33—Contingent Liability—Claim as debt.**

A contingent liability, which may never become a debt, is not provable against the estate of an Insolvent under the Insolvent Act of 1869, and is not barred by his discharge. Defendant underwrote in favor of plaintiff, a policy of insurance on a ship, of which plaintiff was part owner, loss, if any, to be paid in sixty days after proof of loss and adjustment and proof of interest, and the ship was beached in a gale on the 18th October 1872. Efforts were made between 18th and 30th October to get her off, and she was finally hove off and towed to an anchorage on the 31st October where she remained until 9th November. On the 14th she was hauled into a dry dock, and on the sixteenth examined by surveyors, who reported what damage was done, and recommended repairs. On December 3, she was hauled out of the dock, and on December 12, the surveyors reported that all damage had been made good, etc., and on 18th of January, 1873, the adjustment of loss, with proof, etc., were furnished to the broker for the underwriters. On 28th October, 1872, defendant made a voluntary assignment under Insolvent Act of 1869, and obtained his discharge under sec. 105, on 19th January, 1874. The schedule prepared at first meeting of creditors did not include plaintiff's name, nor was his claim included in any supplementary schedule furnished the assignee until about 10th March, 1874, when plaintiff's name was furnished to assignee in time to entitle plaintiff to obtain same dividend as those in original list. Plaintiff was notified to file his claim, but declined to do so, and sued defendant for the full amount. *Held*, That at the time of defendant's assignment, the liability to plaintiff was not a debt payable upon a contingency, but a mere contingent liability which was not capable of being proved, and therefore that the discharge was no bar to the plaintiff's action. *Rowan v. Harrison, Rowan v. Turner*, 2 *Pug.* 503.

**34—Inspector—Writ of replevin directed to Sheriff being inspector.**

Plaintiff as assignee of the estate of H., an insolvent,

brought replevin, the writ being directed to and served by the Sheriff, who was also an inspector of the estate. *Held*, That the Sheriff as inspector was interested in the suit, and the writ of replevin was set aside. *Fairweather v. Nevers*, 2 Pug. 524.

**35—Cash book—Insolvent not keeping.**

A trader who does not keep a cash book is not entitled to a discharge under the Insolvent Act of 1875. *Gilbert Assignee, &c. v. Girouard*, 2 P. & B. 148.

**36—Fraud charged in declaration—Judgment by default.**

In an action brought by plaintiff against defendant, an insolvent, the declaration charged defendant with fraud under sec. 136 of the Insolvent Act of 1875, and interlocutory judgment having been signed, a motion was made for an order for a writ of enquiry to issue to assess the damages, and for the Court to pronounce judgment on the fraud; but *Held*, That the Court had no authority to make any such order, and declined to direct what proceedings should be taken. *Moss v. Kirkpatrick*, 2 P. & B. 220.

**37—Distress for rent—Assignment by tenant—Preferential lien.**

The estate of M. was put in compulsory liquidation under the Insolvent Act of 1869, and the plaintiff, who was the official assignee, took charge of the estate, including goods on the premises of the defendant, McGuirk, then held by M. as his tenant. A year's rent being in arrear while the goods were still on the premises, though in the possession of the plaintiff as the guardian under the Act, McGuirk distrained for rent. *Held*, In an action of replevin brought by the plaintiff to recover possession of the goods, per Ritchie, C. J., and Allen, Weldon and Fisher, J., (Wetmore, J., diss.) that the landlord's common law remedy by distress is not taken away by the Insolvent Act of 1869. Per Wetmore, J., That the landlord's right to a year's rent to which his preferential lien is limited by the 81 sec., can only be enforced by a summary application to a Court or Judge under the 50th sec. of the Act.

*Quære*, Whether the clause in the 81st sec. of the Insolvent Act of 1869, restricting a landlord's preferential lien for rent is not *ultra vires* the Dominion Parliament. *McLeod Assignee, &c. v. McGuirk*, 2 *Pug.* 248.

**38—Replevin Goods distrained for rent.**

Assignee of insolvent may shew fraud in conveyance of premises by insolvent to defendant, and that relation of landlord and tenant did not consequently exist. *See* Landlord and Tenant. *McLeod v. McGuirk*.

**Taxation—Assignment—Lien.**

The estate of an insolvent in the hands of the assignee is liable to taxation. *See* Assessment 22. *Mayor of St. John v. McLeod*.

**Discharge under Act must be pleaded.**

*See* Pleading II. 56. *Grattan v. Girvan*.

**Trover—Sheriff justifying under assignment.**

*See* Trover, 31. *Harris v. Vail*.

**Attachment.**

Dissolution of under Act of Assembly, 37 Vic. cap. 7, (Consol. Stat. cap. 38,) where party makes assignment. *See* Attachment 40. *Bullock v. Ring*.

**Party giving bonds.**

*See* Attachment 37, 38.

**INSOLVENT CONFINED DEBTOR.**

**Application for Relief—Discharge—Refusal.—Discretionary power in Court—County Court Judge.—Order—Non-compliance with—Notice—Execution after discharge—Legal payment—Certiorari.—Costs—Miscellaneous.**

*See* Insolvent Act of 1869.

**1—Application for relief—Accounting for property.**

An affidavit for relief under 1 Wm. IV. cap. 43, must account for all the property the defendant may appear to have possessed. Applications for relief may be made in the suit, or may be considered as distinct judicial proceedings. *Wilmot v. Cornwell and Babine*, Ber. 31.

**2--Confinement--Time.**

To entitle a debtor to a discharge on the ground of having been confined for a year, it must explicitly appear that he has been in confinement for the whole time in the suit in which the application refers. *Ex parte Hennigar*, Ber. 209.

**3--Accounting for property--Voluntary disposition.**

A confined debtor, applying to be discharged under the Act 6 Wm. IV. cap. 41, sec. 4, must account fairly and fully for any property of which he may have been in possession at the time of commencing the action, and relief will not be granted if his inability to discharge the debt arises from a voluntary disposition of his property made pending the action, the value of which is not properly accounted for. *Wyer v. Goss*, 1 Kerr 193.

**4--Assignment of property--Deed--Production.**

Where a person who has assigned his property to trustees for the benefit of his creditors, applies for discharge under the Insolvent Debtors' Act, a copy of the trust deed must be brought before the Court. *McFarlane v. Gordon*, 2 All. 162.

**5--Assignment--Offer--Notice.**

Where a confined debtor, possessed of property, has not offered to assign it to the plaintiffs, at whose suit he is in custody, in the manner directed by the Act 13 Vic. cap. 31, he must clearly shew that such deviation has not been made with any unfair object, before he can claim the assistance of the Court. An assignment of property by a confined debtor to a third party, without notice to the execution creditor, in trust for the benefit of such of his creditors as shall execute the trust deed, within two months from its date and release him, is an undue preference within the meaning of the Act. *Charlotte County Bank v. Williams*, 2 All. 183.

**5 a**—An assignment by an insolvent confined debtor in trust for the benefit of such of his creditors as should execute the deed within a limited time, and release



him from his debts, is *prima facie* an objection to his being discharged from confinement under the tenth section of the Act 13 Vic. cap. 31; but where a debtor had no means of paying his debts, nor any interest in the property assigned, and had been a prisoner twenty months, the Court discharged him. *Charlotte County Bank v. Williams*, 2 All. 258.

#### **6—Variance—Deed—Consideration.**

Where an insolvent debtor having been confined more than a year, applied to the Court for relief, and in setting forth the sum he had received for a lot of land, there appeared a variance of £50 between the price alleged by him and the consideration expressed in the deed of conveyance. *Held*, That this circumstance, unexplained, was a sufficient ground for refusing the application. *Ex parte Goss*, 1 Kerr 164.

#### **7—Conveyance to Son.**

Between the signing of the judgment and issuing the execution, the defendant conveyed his land to his son, who gave a bond to support the defendant for life: the Court refused to discharge him under the Insolvent Debtor's Act, though he had been in custody over twelve months, and though the land had since been sold by the Sheriff under an execution against the defendant; it not appearing that the son had lost the possession of the land, or that the bond was not still in force. *Kelly v. Wilson*, 1 All. 375,

8—Where an insolvent debtor had conveyed his property to trustees for the benefit of such of his creditors as should execute the deed within two months and release him, the Court refused to discharge him out of custody—no satisfactory account being given of the amount of property received by the trustees. *McFarlane v. Gordon*, 2 All. 201.

9—It is no answer to an application for discharge by a debtor who has received the weekly allowance for six months under the Insolvent Confined Debtors' Act (1 Rev.

Stat. cap. 124), that he has the means of supporting himself: that is a ground for suspending the order for support, under the 18th section of the Act. *DesBrisay v. Mooney*, 5 All. 1.

**10**——Defendant having been arrested on *mesne* process, applied for support under the Insolvent Confined Debtors' Act (1 Rev. Stat. cap. 124), and was refused: he afterwards entered special bail, and judgment having been signed in the suit, and a *ca. sa.* issued, he was again arrested, and remained on the limits for upwards of six months. *Held*, That an application to two Justices for support was necessary after the second arrest, before the Court could relieve him under the 9th section of the Act. [By Act 26 Vic. cap. 10, application is to be made to a Judge of the Supreme Court.] *Wallace v. Coleman*, 5 All. 19.

**11—Power in Court to discharge—Confinement for year.**

The Court is empowered to discharge an insolvent confined debtor after he has been a year in prison, although he may not have applied for weekly support. An objection to the discharge, on the ground that such an application has not been made, must come from the creditor; otherwise the Court will not notice it. *Fairbanks v. Dolby*, 2 Kerr 80.

**12—Discretionary power—Preference without fraud.**

The Supreme Court has a discretionary power to discharge an insolvent debtor under the Act 6 Wm. IV, cap. 41, and will exercise such discretion where the debtor has not acted fraudulently, though he has given a preference to creditors which would prevent his discharge by two Justices under the second section of the Act. *Parker v. Bois*, 1 All. 723.

**13—Quashing order of Justices.**

Where Justices make an order for support under the Insolvent Debtor's Act—(1 Rev. Stat. cap. 124,)—and it appears by the examination of the debtor that he has

given an undue preference to one of his creditors—this Court has power to quash the order. *McDonald v. W'att*, 1 *Han.* 24.

**14**——County Court Judge has power to discharge debtor in any county within his district, or to bring debtor from any county within his district, and possesses same power as Supreme Court Judge to discharge. *Ex parte Jardine*, 1 *Han.* 572.

**15—Order—Justices—Discharge for non-payment.**

An order for discharge for non-payment of weekly allowance, under the Insolvent Debtors' Act, 1 Rev. Stat. cap. 124, need not be made by the same Justices that made the order for support. *Parker, J., and Richard J., dissentientibus. Jones v. Fletcher*, 4 *All.* 550.

**16—Notice of order.**

Where the creditor's attorney was in Court, and heard the order for support made, notice of it is not required, *Ex parte Jardine*, 1 *Han.* 572.

**17—Execution after discharge.**

Where an Insolvent Debtor has been discharged under the 1 Rev. Stat. cap. 124, the Court refused to allow a new execution to issue against him, though the weekly allowance had been tendered to the gaoler of the county upon the limits of which he was confined, and at the house where he lodged. *Doe v. Holmes*, 4 *Kerr* 557.

*Semble*, That if the order for discharge had been irregularly obtained, it should be set aside before any proceedings are taken against the Debtor. *Ibid.*

*re* Act of Assembly 23 Vic. cap. 28, authorizing payment to gaoler at gaol.

**18—Legal payment.**

Payment of the weekly allowance to a confined debtor may be made in coins which are not a legal tender, if not objected to. *Hatheway v. Day*, 4 *All.* 595.

**19—Certiorari.**

A certiorari lies to remove into Supreme Court the proceedings before Justices under Insolvent Confined Debtors' Act. *White v. Coleman*, 4 *All.* 630.

**20—Costs.**

Costs will not be given on refusing the first application of an insolvent debtor, except in an extreme case, but the rule is otherwise on a second application where the objections made at the former, are not fully answered. *See McFurlane v. Gordon, 2 All. 162.*

**21**——Where an application to discharge an insolvent debtor was refused with costs, the Court refused to make the payment of the costs a condition precedent to another application. *See McFurlane v. Gordon, 2 All. 201.*

**22—Order by County Court Judge—Power of Supreme Court to grant discharge.**

Where an order for support under the Insolvent Confined Debtors' Act, 1 Rev. Stat. cap. 124, is made by a Judge of the County Court, a Judge of the Supreme Court has no jurisdiction to order his discharge for non-payment of the weekly allowance. *Guthrie v. Snelling, 1 Pug. 360.*

**23—Motion for discharge—Fraudulent disposal of property.**

A motion for discharge under the Insolvent Confined Debtors' Act, was dismissed with costs, it appearing that defendant had been guilty of fraudulently making away with his property, and had refused to pay plaintiff, although he had ample means after the commencement of the action. *Merritt v. Godfrey, 5 All. 101.*

**24—Assignment under Insolvent Act of 1869.**

Debtor making assignment under Insolvent Act of 1869, cannot make application for relief under Insolvent Confined Debtors' Act. *Re Begeau, 2 Pug. 200.*

**25—Refusal of discharge by Justice—Affidavit on motion before Court—Necessary statement.**

On a motion for discharge under the Insolvent Confined Debtors Act, 1 Rev. Stat. cap. 124, sec. 9, the affidavit must state the reason why the application to the justices was refused. It is not sufficient to swear in the words of the Act that the former application was made "without success." *Higgins v. Hamilton, 5 All. 12.*

**26—Imprisonment under process from Court of Governor and Council.**

A person imprisoned under a writ *de contumace capi-endo* issued out of the Court of Governor and Council under the Act 4 Wm. IV, cap. 80 will not be discharged under the provisions of the Insolvent Confined Debtors' Act. *Ex parte Chase*, 6 All. 398.

**Non-suit—Defendant becoming insolvent.**

*See* Judgment, as in case of Non-suit II. 6, 11.

**Partner—Power to compound debt.**

*See* Partnership 8.

**Ascertaining insolvency.**

*See* Pleading II. 86.

**Pleading discharge—Replication fraud.**

*See* Pleading II. 3.

**Sheriff's poundage on Ca. Sa.—Debtor obtaining discharge.**

*See* Sheriff 16.

**Application for Certiorari to bring up proceedings before Justices.**

*See* Certiorari I. 4.

**INSPECTOR.**

*See* Common School Act 1871.

**INSTALMENT.**

*See* Joint Stock Company.

**INSURANCE.**

**1—Insurance on house—Title—Interest.**

Plaintiff being in possession of a house effected insurance upon it as owner. The property on which the house stood was leasehold, and the legal title prior to the insurance was in W., under whom plaintiff claimed by a writing (said to have been burned,) not under seal, and stating no consideration. It appeared that W. had, before the insurance, assigned the lease to B. by deed duly registered. *Held*, That the title was in B. by the registry of the assignment, without any entry, and that plaintiff had

no insurable interest. *Crockford v. London and Liverpool Insurance Co.*, 5 All. 152. S. P.—*Crockford v. Equitable Insurance Co.* 5 All. 651.

## **2—Declarations—Evidence.**

In an action against the Secretary of the Society of Underwriters, under the Act 21 Vic. cap. 61, the declarations of an underwriter on the policy, relative to the subject matter, are evidence against defendant. *Duffy v. Stymest*, 5 All. 197.

## **3—Fraud—Entire contract.**

Plaintiff insured two buildings, and the merchandise in one of them, against loss by fire. One of the conditions of the policy declared that if there should be any fraud, overcharge or false swearing, the claimant should forfeit all claim under the policy. One ground of defence to an action brought on the policy was, that the plaintiff made a false declaration as to the value of the goods lost by the fire. *Held*, That the contract was entire; and if the plaintiff was guilty of fraud or false statement in reference to the goods, he could not recover any part of the insurance. *Cashman v. London and Liverpool Ins. Co.*, Hil. T. 1862.

## **4—General average—Rule.**

A vessel sailed from Shields, G. B., bound for Providence, Rhode Island, and was obliged to put into Cowes and Cork to refit. A jettison occurred durring the voyage, and on her arrival at Providence, a general average was made up, according to the rule of that port, which included an allowance for seamen's wages and maintenance. *Held*, That the rule prevailing at the port of destination was to be adopted in making up the adjustment of general average charges; and not the rule in England, where such charges would be excluded. *McGivern v. Stymest*, 5 All. 320.

## **5—Repairs—Not seeking instructions—Sale of vessel—Liability for total loss—Damages.**

A vessel sailed from Havana for New York, and the next day struck on a rock: she continued on her voyage for ten days, and then put back to Havana, which she reached in five days. A survey was held, and it was found

that she could not safely proceed to New York without repairs, which the captain said would cost there more than the vessel was worth, though they could have been made in this Province for about £75. The vessel was safe in the harbour of Havana without repairs; and instructions respecting her, might have been received from the owners within a month. *Held*, That the captain was not justified in selling the vessel, and that the underwriters were not liable for a total loss, without notice of abandonment. *Semble*, That even if the plaintiff could have recovered for a partial loss, it could only be for nominal damages, as there was no evidence by which the amount of loss could be estimated. *Wood v. Stymest*, 5 *All.* 309.

**6—Certificate of nearest Magistrate—Interest—Disqualification.**

One of the conditions of a policy required, that persons sustaining loss should procure a certificate of a magistrate or notary "*most contiguous* to the place of the fire, and not concerned in the loss, as a creditor or otherwise, or related to the insured or sufferers," that he was acquainted with the insured, and verily believed that he had sustained the loss without fraud, etc. *Held*, That where the nearest magistrate was also a sufferer by the same fire which destroyed the plaintiff's property, he was disqualified from certifying under the words of the condition, "concerned in the loss as a creditor, or otherwise."

*Quere*, Whether the fact of the nearest magistrate being a creditor of the insured disqualified him from certifying. *Semble*, No. *Ganong v. The Aetna Ins. Co.*, 6 *All.* 75.

**7—Transfer of ship—Security—Intention.**

Where a bill of sale of a ship has been executed, it may be shown that the transfer, though absolute in its terms, was intended only as a security, and that the transferrer has an equity of redemption. *Millidge v. Stymest*, 6 *All.* 164.

**8—Notice of abandonment must be given by legal owner—Notice by equitable owner—Recovery.**

Notice of abandonment must be given by the legal

owner of a vessel. Where such notice was given by an equitable owner, and a verdict recovered against the underwriters as for a constructive total loss, the verdict was set aside: the plaintiff only being entitled, as equitable owner, to recover for partial loss. *Ibid.*

**9—Preliminary proof—Waiver.**

The mere fact that an Insurance Company states no objection to the preliminary proof given of a loss, at or after the time of its being received, is no evidence of a waiver by them of objections to it; but where objections are made on other grounds, and no objection taken to the sufficiency of the preliminary proof, it may be evidence of a waiver. *McManus v. The Ftna Ins. Co.*, 6 All. 314.

**10—Constructive total loss.**

An insurance on fish was declared in the policy to be "against total loss." *Held*, That a constructive total loss came within the words of the policy. *O'Leary v. Stymest*, 6 All. 289.

**11—Claim for constructive total loss—Evidence of partial loss—No evidence of amount of repairs—Damages.**

Plaintiff claimed for a constructive total loss, but the evidence showed a partial loss only—the vessel having been repaired and sailed again. No evidence was given as to the amount of repairs, and the plaintiff was non-sued. *Held*, That the non-suit was wrong; and that plaintiff was entitled to a verdict for nominal damages at all events. *Millidge v. Stymest*, East T. 1866.

**12—Mortgagee—Foreclosure—Sale—Extinguishment of interest.**

Plaintiff insured his interest in a house as mortgagee: the mortgage was afterwards foreclosed, and the property sold under the decree, and purchased by the plaintiff. *Held*, That his mortgage interest was extinguished by the foreclosure and sale, and that he could not recover for a loss happening afterwards. *Gaskin v. The Phoenix Ins. Co.*, 6 All. 429.

**13—Mortgagee—Insurance by—Debt paid.**

Where a mortgagee insures, solely on his own account,



it is only an insurance of his debt ; and if the debt is afterwards paid, or the mortgage discharged, the policy ceases to have any operation. *Ibid.*

**14—Continuance of Policy on Goods—Change of Ownership — Agent — Want of Seal — Covenant not maintainable.**

A policy of insurance on goods, against loss by fire, was affected in the name of G. F. & Co., H. F., the plaintiff, having afterwards become the owner of the goods, the agent of the Company made and signed the following indorsement on the policy : " This insurance is hereby continued in the name of H. F." *Held*, (assuming that the agent had power so to continue the assurance for the benefit of the plaintiff,) That the indorsement not being under the seal of the Company, the plaintiff could not maintain covenant on the policy. *Frost v. The Liverpool, London & Globe Ins. Co., Hil. T. 1871.*

**15—Insurance—Value—Recovery.**

Plaintiff insured \$5,000 on his interest as mortgagee, in the undivided half of a mill and machinery. The mill was burnt, and the plaintiff furnished the agent of the Company with the preliminary proof required by the policy, which he considered sufficient, and agreed to pay the loss, but requested the plaintiff to allow the Company sixty days to pay it, to which he assented ; and the agent then gave the plaintiff a letter, stating that he had examined plaintiff's claim ; that the loss appeared satisfactory, and that he agreed to pay it within sixty days from that date. Soon after this, one G. wrote to the agent, stating that he owned half the mill property, and claimed half the amount insured, as the mill was insured to its full value. The agent thereupon wrote again to the plaintiff, and after referring to a proposal by G. that the Company should re-build the mill, stated that under any circumstances the Company were bound to protect him from loss, and that they held themselves to indemnify him fully. There was evidence that the mill was not worth more than half the amount insured upon it. In an action on the policy, the defendant paid \$2,500 into court, and pleaded that the

plaintiff's interest did not exceed that sum. The jury were directed that the plaintiff could only recover the actual value of his interest in the mill; that if the defendants agent, with knowledge of the facts, had adjusted the loss with the plaintiff, and there was no fraud, it would be evidence of the amount of the loss, though not conclusive on the defendants. The jury found that the adjustment was made by the agent with a full knowledge of all the facts, or with the means of knowledge; and that he affirmed the adjustment after he had the knowledge. They gave no answer to questions as to the value of the mill at the time of the fire, and the amount of loss sustained by the plaintiff by the fire, but found a verdict for the plaintiff for the amount claimed. *Held*, That there was no misdirection, and that the verdict was warranted by the evidence. *Held* also, That the fact that other property besides the mill, was conveyed to the plaintiff by his mortgage, as security, did not affect his right to recover on the policy. *Thomson v. The Liverpool, London & Globe Ins. Co., Hil. T. 1871.*

#### **16—Insurable interest—Agreement for re-conveyance.**

Plaintiff being a mortgagor in possession of a mill, conveyed it away by a deed, absolute on its face, taking an agreement for a re-conveyance on payment of a certain sum which he owed the grantee. *Held*, That this was in effect a mortgage, and that the plaintiff had an insurable interest. *Kelly v. The Liverpool, London & Globe Ins. Co., Hil. T. 1871.*

#### **17—Other insurances avoiding policy — Meaning of condition.**

One of the conditions of a policy declared that it should be void in case any other insurance was made on the property, unless notice thereof was given to the Company. *Held*, That this only referred to other insurances made by the assured, or with his knowledge or consent; and not to an insurance made by his mortgagee, without his knowledge. *Ibid.*

#### **18—Policy—Construction—Time risk.**

A policy of insurance on a vessel "for four calendar

months on a fishing voyage, beginning the adventure from the 11th June instant, and to continue until the said expiration of four months," without stating where the vessel was to sail from, or whither she was to return, is a time risk, and is not terminated by the vessel returning from a fishing voyage within that period. *Dimock v. New Brunswick Marine Assurance Company*, 3 Kerr 654.

**19—Fire policy—Increase of risk.**

A policy of insurance against fire upon a dwelling house, contained a condition that if, after the insurance was effected, the risk was increased by any means within the control of the assured, or if the building should, without the assent of the assured, be occupied in any way so as to render the risk more hazardous than at the time of insuring, the insurance should be void. *Held*, That the assured afterwards ceasing to occupy the house without any fraudulent intent, was not an increase of the risk within the meaning of the condition, unless it was proved that under the circumstances and situation of the building insured, its destruction by fire was more probable when unoccupied, than if the assured had continued to reside in it. *Foy v. The Aetna Insu. Co.*, 3 All. 29.

**20—Signing by accredited Agent — Validity — Prima facie proof—Corporate seal.**

A policy of insurance of a Foreign Company declared that it should not be valid until countersigned by W. the agent at Saint John. In action on the policy, proof that it was signed by W. and that he acted as the agent of the Company at Saint John, and had paid a loss on a similar policy, is sufficient under the Act 13 Vic. cap. 37, if uncontradicted, to shew that he was the accredited agent of the Company, and to dispense with proof of their corporate seal. *Robertson v. The Provincial Mutual and General Insurance Co.*, 3 All. 379.

**21—No Patent Ambiguity—Usage of Trade.**

A policy of insurance on a vessel, described the voyage to be from "St. John to a port of call and discharge and loading in the West Indies." *Held*, That there was no

patent ambiguity, and that the words of the policy meant one port both for discharge and loading : and not two ports—one for discharge, and another for loading. *McGivern v. The Provincial Insurance Company*, 4 All. 64.

*Quære* Whether, if it had appeared by the usage of trade, that a peculiar meaning was attached to the words "a port of call and discharge and loading," the policy might not have been construed according to such usage. But also, *Semble*, That such usage and construction should be averred in the declaration. *Ibid.*

#### **22—Issue of Policy—Time—Notice to broker.**

The business of an insurance company was managed by an agent residing in St. John, to whom application for insurance in other parts of the province were made through brokers. *Held.* (per Ritchie, J.) That a policy was issued when the agent forwarded it to the broker for delivery. Notice of a prior insurance to an insurance broker, is not notice to the company. *McLachlan v. Aetna Insurance Co.*, 4 All. 173.

#### **23—Interest of assured—Declarations.**

In an action upon a policy of insurance for the loss of a vessel, the verbal declarations of the plaintiff, the sole registered owner, that another person, a foreigner, was part owner, are not sufficient to disprove the allegation of interest in the plaintiff, who had obtained the register upon his own declaration, and acted as owner in procuring the insurance, and in the other affairs of the vessel. *Watson v. Summers*, 2 Kerr 62.

#### **24—Preliminary proof—Conditions precedent.**

In an action on a policy of insurance containing a proviso that the loss was to be paid within sixty days after proof of loss and adjustment, and proof of interest in the property such preliminary proof is a condition precedent to the plaintiff's right to recover, unless there is an averment that it has been waived. *Robertson v. The New Brunswick Marine Insurance Company*, 3 All. 333.

#### **25—Mortgagor—Incumbrance—Disclosure.**

A mortgagor may insure to the value of his property

without disclosing the incumbrance, unless there is a stipulation in the policy requiring it. *Parker v. Equitable Ins. Co.*, 4 *All.* 562.

**26—Abandonment—Refusal to accept—State of facts governing recovery.**

A vessel was driven on shore, and being supposed to be a total loss, notice of abandonment was given to the underwriters. They refused to accept the abandonment, got the vessel off, brought her to St. John, her port of destination, in a place of safety, before action brought, and required the owner to take charge of her. The cost of repairing her after she was brought to St. John by the underwriters, would be less than her value when repaired. *Held*, That the right of the assured to recover depended upon the state of facts existing at the time the action was brought, and that he could only recover for a partial loss. *Taylor v. Smith*, 1 *Han.* 120.

**27—Over-Valuation.**

A house was insured by plaintiff for £250, and proved to have been worth at least £400. *Held*, That if the plaintiff was only entitled, as widow, to half the estate, there was not an over-valuation. *Lingley v. Queen Ins. Co.*, 1 *Han.* 280.

**28—False statements—Statements in affidavit—Account of loss—Delivery of.**

A condition of a policy of insurance on clothing, provisions, etc., in St. John, required that persons sustaining loss should forthwith give notice thereof to the Company, and within fourteen days thereafter deliver in as particular an account of the loss as the nature and circumstances of the case would admit of, and make proof of the same, etc., and if there appeared any fraud or false statement, or that the fire happened by the wilful means, or connivance of the insured, he should be excluded from all benefit under the policy. The plaintiff's affidavit furnished to the Company under this condition, claiming a loss of furs, clothing and bedding by fire, stated that he was in the County of Sunbury at the time of the fire, and was unable

to ascertain in what manner it originated. In his evidence on the trial, the plaintiff swore that he left St. John about 7 o'clock p. m., on his way to the County of Sunbury, where he arrived the following morning; the fire broke out at 9 o'clock, at which time the plaintiff would have been in the County of Kings, on his way to Sunbury, and only a few miles from St. John. The house was locked when the fire was discovered, and on being broken open it was found to be in a room in which there was neither fire-place nor stove, and no appearance of any clothing or bedding; a candlestick was found in a barrel in this room, containing straw partly consumed. *Held*, That it was the duty of the plaintiff to state in his affidavit that the house was locked at the time of the fire, the circumstances connected with his leaving, and where he was at the time, and that his statement that he was in the County of Sunbury, was a false statement and avoided the policy. *Held* also, That an account of the loss delivered within fourteen days after knowledge thereof by the assured was in time, though more than fourteen days had elapsed since the fire. *Smith v. The Queen Ins. Co.*, 1 *Han.* 311.

**29—Deviation—Intention—Change of risk—Detention—Justifiable delay a question of law—Reasonable delay a question for jury.**

A ship was insured for a voyage from Liverpool to Cardiff, thence to Aden, and from thence to India or Burmah. She was chartered for and set sail from Cardiff to Aden, with the intention of proceeding from Aden to Chinha, instead of India or Burmah, and was lost before reaching Aden. *Held*, No deviation, and that the underwriter was liable. *Reed and another v. Weldon*, 1 *Han.* 458.

A ship was insured for a voyage from Dundee to St. John, N. B., thence to a port of discharge in the United Kingdom. She started on her voyage and arrived at St. John, where she was put on the blocks, detained 17 days, repaired and re-classed. *Held*, That this changed the risk, was equivalent to a deviation, and avoided the policy. *Ibid.*

Whether delay in a voyage is unjustifiable or not, is a

question of law for the Judge; but whether unreasonable or not, is a question for the jury. *Ibid.*

**30—Not communicating important facts.**

Plaintiffs applied to defendants on Nov. 12th to insure their vessel on a time policy for six months, beginning on the 9th Sept. previous, the day on which she left Swansea for St. Thomas, where she was then overdue. In the written application in reply to the question "where bound," the plaintiff's reply was "a port in the West Indies." The news of a hurricane having occurred at St. Thomas had been published in the newspapers that morning, and was known to plaintiffs but not to defendants. *Held*, in an action to recover for a total loss, That the destination of the vessel and the fact of there being a hurricane at her port of destination, should have been communicated to defendants, and this not having been done, the plaintiffs were non-suited. *Mahoney v. The Provincial Ins. Co.*, 1 Han 622.

**31—Re-Insurance—Relation of policy.**

Plaintiff's premises were insured in The London and Liverpool Company, from 2nd October, 1865, to 2nd October, 1866. Before the term expired he received notice from W., the agent at Newcastle, that the London and Liverpool Company would renew the policy on the same terms, and accordingly he paid W. the premium money and got his receipt. A., the general agent at St. John, declined to renew the policy, and paid the premiums to defendants, who issued a policy (taking the description of the premises from the London and Liverpool books) dated the 16th October, 1866, but insuring from the 2nd October, 1866, to 2nd October, 1867. The premises were destroyed by fire on the 18th October, before the policy issued; but the plaintiff did not know that he was insured by defendants until he received the policy from W., who also acted for them. *Held*, That this amounted to a re-insurance, and there being no fraud, plaintiff was entitled to recover; that the policy related back to the 2nd October, and that the condition in the policy, that all facts relating to the

state of the premises must be disclosed, must be taken to relate to the time from which the policy took effect. *Giffard v. The Queen Ins. Co.*, 1 Han. 432.

**32—Insurable interest—Widow.**

A widow having continued, for four years after her husband's death, in possession of a house built on land of which he was the lessee for years, and paid the ground rent, insured the house in her own name. No administration was taken out on the husband's estate. *Held*, That she had an insurable interest—1st. As the presumptive owner of the house; 2nd. As executrix *de son tort*; 3rd. As the widow under the Statute of Distribution. *Lingley v. The Queen Ins. Co.*, 1 Han. 280.

**33—Promise by Underwriter to pay—Knowledge of facts.**

Where it was proved on the trial of a case against an underwriter, on a policy of insurance for a loss, that the defendant had promised to enquire as to the particulars of the loss, and if correct, pay it; and that after several days he did promise to pay, the Court refused to disturb a verdict for the plaintiff, although there was evidence of a deviation, which otherwise would have avoided the policy. *Reed v. McLaughlin*, 2 Han. 128.

**33 a—Waiver of proof of loss.**

Plaintiff, whose stock of goods in his store was insured by defendants by a policy under seal, sold them to A., taking notes in payment. Subsequently, at the office of defendants' agent, and by his consent, he indorsed on the policy that he hereby assigned it to A., having sold him the goods. This assignment was entered on defendants' books, but not made under seal, and A. was not informed of it. The first note being unpaid, plaintiff, by consent of A., took back the goods, and possession of the store. They were afterwards consumed by fire. *Held*, That the assignment on the policy was invalid, and that plaintiff could recover under the policy for the loss. *Weldon, J., dissentiente*; *Fisher, J., dubitante*. Where, in an action to recover insurance, the defendants' witness contradicted



the plaintiff as to the value of the goods lost by fire, but the jury were properly directed as to the measure of damages, the Court refused to disturb their verdict, even though they might have given less had they been on the jury. The plaintiff's attorney testified that he met defendants' agent in the street, and said he had the proofs ready except a certificate, which he feared he could not get in the time required by the policy; that defendants' agent said it made no difference, but to get the proofs as soon as he could. Defendants' agent denied this conversation. *Held*, This was evidence of waiver to go to the jury. *Crozier v. The Phoenix Ins. Co.*, 2 *Han.* 200.

**34—Detention — Re-classing — Deviation — Seaworthiness at inception of voyage.**

A vessel was insured for a voyage from Dundee, Scotland, to St. John, thence to a Port in the United Kingdom. On her arrival at St. John she was placed on the blocks, re-paired and re-classed, being detained 17 days. *Held*, In an action to recover the amount of the insurance, that in the absence of any evidence of the vessel having sustained damage on the voyage from Dundee to St. John, such detention for re-classing was a deviation, and avoided the policy. A vessel insured for a round voyage is bound to be sufficiently seaworthy at its inception to make it without repairs, in the absence of any damage from extraordinary perils of the sea. *Reed v. Philips*, 2 *Han.* 172.

**35—Deviation.**

Insurance on a ship "at and from Saint John to a port of call and discharge and loading in the West Indies, and from thence to a port of call and discharge in the United Kingdom." The ship sailed from Saint John to Havana, discharged her cargo, and then sailed to Matanzas, another port in the West Indies, where she took in a cargo and sailed for Cork, and was lost on the voyage. *Held*, That going to Matanzas was a deviation. *McGivern v. Provincial Insurance Co.*, 3 *All.* 311.

*Quere*, Whether calling at a port for orders, before going to a port of discharge, would have been a deviation. *Ibid.*

**36—Losses—Jettison—Recovery—Contribution.**

Where the owner of a ship is also the owner of part of the cargo, which was thrown overboard for the preservation of the ship in the course of the voyage, on which insurance was effected. *Held*, That such owner might recover from the insurer on the ship the average proportion which the ship would be liable to contribute to the loss sustained by such jettison of the cargo. *Marks v. Watson*, 2 Kerr 211.

Where the goods are laden on deck according to the custom of a particular trade, the owner thereof is entitled to contribution in general average for a loss by jettison. *Ibid*.

**37—Defence—Previous insurance—Foreign law.**

One of the conditions of a policy of insurance was, that if the assured should have any other insurance on the property, not notified to the insurers and indorsed on the policy, the insurance should be void. At the time of insuring his house with the defendants, the plaintiff had an insurance thereon in the name of M., in an office in the State of Maine. *Held*, That as by the law of this country, neither the plaintiff nor M. could recover on that policy, the defendants, in order to avoid their policy for want of notice of the previous insurance, should have shown that by the law of Maine the plaintiff could recover on the policy effected by M. *McLachlan v. The Aetna Insurance Company*, 4 All. 173.

**38—Requisite proof—Preliminary proof—Affidavit—Materiality of description.**

One of the conditions of a policy of insurance required, that all persons sustaining loss should give notice to the agent through whom insured, and within one month after the loss, deliver in as particular an account thereof as the nature of the case would admit, and, if required, make proof of the same by their oath or affirmation, and by the production of their books of account, etc., and should, if required, procure a certificate under the hands of three of the nearest householders, etc. The plaintiff having sustained a loss, furnished an affidavit and certifi-

cate in the terms of the condition, without being required to do so. In an action on the policy, one of the notices of defence was that the proof and certificate required by the condition were not given by the plaintiff after the alleged loss; but the defence on the trial was, concealment at the time of effecting the policy. *Held*, 1. That the affidavit and certificate were admissible as part of the preliminary proof. 2. But if not strictly admissible, it was immaterial evidence, and therefore no ground for a new trial. *Perkins v. The Equitable Insurance Co.*, 4 All. 562.

The plaintiff in his application to insure a building, stated that it was owned by himself and P., and worked by them as a mill. At that time the mill was in the possession of a tenant under a lease for five years, was mortgaged to its full value, and a line of railway had been laid out through the land, for which the plaintiff claimed damages, alleging that it destroyed the mill. There being nothing in the policy requiring such matters to be described, it was left to the jury, and they found, that the non-disclosure was not material. *Held*, That these questions were properly left. *Ibid*.

### 39—Answers to questions—Warranty.

An Insurance Company required application for insurance to be made on printed forms containing certain questions which were to be minutely answered, and were declared to form the basis of the insurance. One of the questions was: "Is the property involved in law, or mortgaged; if the latter, to whom, and for what amount?" The answer was: "There is a mortgage on the house for £300"—which was untrue. This application was referred to in the policy, one of the conditions of which was, that if the buildings were described otherwise than they really were, the insured should not be entitled to any benefit under the policy. *Held*, 1. That the answer to this question amounted to a warranty, and being untrue, rendered the policy void. 2. That being an essential part of the contract, its materiality was not a question for the jury. *Marshall v. The Times Fire Ins. Co.*, 4 All. 618.

**40 — Months — Commencement of action — Issue of writ.**

A policy of insurance is a mercantile instrument; therefore the term "Months" used therein, limiting the time for bringing an action for a loss, means calendar months. *Pomares v. Provincial Insurance Co., Hil. T. 1878.*

Where one of the conditions of a policy declared that no action should be brought thereon, unless within 12 months after the loss; it will be presumed, in the absence of evidence of the time the writ actually issued, that it issued on the day it bears date. *Ibid.*

**41—Loss payable to plaintiff—Action — Conditions—  
Partial Loss — Preliminary proof — Deviation —  
Suspicious circumstances—Fraud left to Jury.**

Where the plaintiff procures an insurance on a vessel belonging to M., and by the terms of the policy the loss is to be paid to the plaintiff, he may maintain an action thereon in his own name. *Dimock v. The New Brunswick Marine Assurance Company, 1 All. 398.*

By the conditions of a policy the insurers agreed to pay within sixty days after proof of loss, etc., but that no partial loss should be paid for unless it exceeded five per cent. The plaintiff delivered the master's protest describing the loss, and the certificate of a ship carpenter that the vessel was not worth repairing. *Held, 1.* That there was sufficient preliminary proof to enable the plaintiff to recover for a partial loss, and that a certificate from the custom house that the register of the vessel had been deposited there as a condemned vessel, was not necessary. *2.* That the plaintiff might recover for a partial loss, though he claimed a total loss; and that in the absence of any evidence by the defendant of the extent of the injury, there was sufficient evidence to sustain a verdict for a partial loss, though the vessel was afterwards partially repaired, and the value of the repairs was not shewn. *Dimock v. The New Brunswick Marine Assurance Company, 1 All. 398.*

Whether going to Saint Stephen on the River Saint Croix was a deviation, or in prosecution of the necessary

purposes of a fishing voyage, upon a time policy, was considered a question proper for the jury upon the evidence. *Ibid.*

Though the circumstances of a loss are suspicious, if there is some evidence of its being accidental, which is uncontradicted, and the question of fraud has been fully left to the jury, who find for the plaintiff, the verdict will not be disturbed. *Ibid.*

**42—Premium earned — Policy cancelled — Premium notes not matured—Agreement**

Defendant effected insurance on a vessel in several offices, for all of which R. was agent \$5,000 being in plaintiff's office. Subsequently defendant desiring to send the vessel to a port prohibited by the policy obtained from R. permission to do so on payment of an extra premium,  $\frac{3}{4}$  per cent to be returned if the vessel left on or before the 25th November, 1874. R. at the same time told him, he might insure the vessel elsewhere if he could, and he would cancel the policy upon payment of the earned premium. Shortly after this, defendant effected insurance in another office and sent the other policies to R. requesting a return of  $\frac{3}{4}$  per cent. premium, claiming the vessel had been covered before 25th November. R. returned the  $\frac{3}{4}$  per cent. premium and received from defendant's clerk a receipt for this amount which also stated that the policy was cancelled from the 25th November. Shortly afterwards, R. sent defendant a statement of the amount which he required defendant to pay before cancelling the Policies, and insisted on its payment in cash. Defendant claimed that he was not entitled to pay anything until the premium notes matured.

*Held*, That the payment of the earned premiums and cancellation of the policies were intended to be contemporaneous acts. *Bangor Ins. Co., v. McLeod. Security Ins. Co., v. Same.* 2 Pug. 37.

**43—Agent.**

Where the plaintiffs have expressly excepted themselves from payment of a general average loss for jettison of deck

cargo, the agent could not impose upon the plaintiffs a liability which the defendant had warranted them to be free from, and whether he promised to pay the loss or not is immaterial. *Ibid.*

**44—Conditions — Pleading — Proof of issue joined—  
Agents statements—Issues material, and immaterial.**

Defendants, to an action on a policy of insurance, pleaded (inter alia) the breach of certain conditions of the policy, "whereby the policy was rendered void. Plaintiff joined issue. *Held*, That on this issue, it was sufficient for defendants to prove the alleged breach of conditions, and that plaintiff could not show a waiver, nor was it open to him to show that at the time of making his written application for insurance, the agent of the company wrongfully inserted in the application a statement different from that made to him by the applicant.

Where defendant pleaded four pleas, two of which were an answer in law, to plaintiff's action, and he was nonsuited. *Held*, on motion to set aside the non-suit, that he was not entitled to have finding of the jury on the other issues—they being immaterial. *Martin v. Mutual Fire Ins. Co.* 3 *Pug.* 157.

**45—Policy — Conditions — Entire contract — False swearing as to part of property insured.**

In a policy of insurance on buildings and merchandise, one of the conditions of the policy declared that if there should be any fraud, overcharge or false swearing, the claimant should forfeit all claim under the policy; *Held*, That the contract was entire, and that if plaintiff was guilty of false swearing in reference to the goods, he could not recover any part of the insurance. *Cashman v. London and Liverpool Fire Ins. Co.*, 5 *All.* 246.

**46—Preliminary proof—Dispensing with—No waiver of objection.**

The mere fact that defendants did not require further preliminary proof as they might under the policy have done will not prevent them availing themselves of the objection that there had been false swearing. *Ibid.*

**47—Defendant's Agent giving evidence as to origin of fire—Waiver—No evidence of.**

The fact that the defendant's agent gave evidence before a magistrate on an investigation as to the origin of the fire, held under the Act 21 Vic. cap. 48, is no evidence of a waiver of objection.

**48 — Conditions precedent — Averments — Pleading waiver—Redress under Common Law Procedure Act—Improper conduct of insured.**

In an action on a policy of insurance, the declaration, after setting out policy and conditions, alleged (*inter alia*) that plaintiff gave all notices, and made all proofs, and had performed all things on his part to be performed to claim the loss, and did all things necessary to entitle him to recover, "and that defendants waived any notice or proof of the loss as required by the policy." The sixth condition of the policy was, that on the happening of any loss, the insured should forthwith give notice in writing, and within fifteen days furnish proof of the loss under oath. The tenth condition declared that, "if the claim be in any respect fraudulent, or if any false declaration, affidavit, oath or affirmation be made in support thereof," all benefit under the policy should be forfeited. Defendants pleaded—1. No waiver of notice and proof of loss. 2. The documents rendered as and for the proof of loss were false and fraudulent. 3. After commencement of the fire, the plaintiffs wilfully and wrongfully prevented it from being extinguished. The Court *Held*, on general demurrer, That all the pleas were good; that as the declaration would be insensible if notice had been given, it was sufficient for defendants to accept the issue of waiver of notice and proof; and that, however, as to the second plea, plaintiff might have the right to apply to a judge under sec. 91 of the Common Law Procedure Act, to obtain a more explicit statement of the facts. *Gibson v. N. British & Mercantile Ins. Co.*, 3 Pug. 83.

**49—Insurable interest—Advances to build vessel—no transfer.**

Plaintiff, in 1872, commenced supplying B. with advances for building a vessel, under a verbal arrangement

that he was to supply B. to build the vessel, and hold her as security for his advances. He was to dispose of her in shares, or in the whole, as he saw proper, and when the vessel was disposed of, whatever was remaining after he got his pay, was to go to B. When she was well advanced, in August, 1874, plaintiff effected insurance on her in his own name. He, however, never had possession of the vessel, nor held any bill of sale or transfer of her. *Held*, In an action on the policy, That plaintiff had no insurable interest, and could not recover. *Clarke v. Scottish Imperial Ins. Co.*, 2 P. & B. 240.

**50—Certificate of loss by magistrate—Sufficiency of—Statement of amount of loss necessary.**

In an action on a policy of insurance, by one condition of which the plaintiff was bound to produce as part of his proof of loss, a certificate of a magistrate or notary public most contiguous to the place of fire, not concerned in the loss, &c., that he was acquainted with the character and circumstances of the assured, and had made diligent inquiry into the fact set forth in his statement, and that he knew or verily believed that the insured really and by misfortune, and without fraudulent practice, had sustained by such fire, loss and damage to the amount therein mentioned, it was *Held*, That a certificate which did not state the amount of the loss, but only that the insured had sustained by the fire the "total loss of his two-story framed building therein mentioned"—was not a sufficient compliance with the condition, and that the setting forth of the amount of the loss in the certificate was a condition precedent to the right to recover. *Borden v. Provincial Ins. Co.*, 2 P. & B. 381.

**51—Foreign Insurance Company—Completion of policy—Agency in New Brunswick—Illegality.**

A policy of insurance, issued in New York and delivered in Boston to a broker, by whom it was sent to St. John, to his agent, and by him handed to the defendants, who gave in return a premium note was held not to have been complete, until actually delivered, and the transac-



tion was illegal under Act of Assembly 19 Vic. cap. 45. which prohibits any foreign insurance company from doing business in the Province without first filing a certificate in the Provincial Secretary's office. *Allison v. Robertson*, 2 *Pug.* 108.

**52—Foreign Insurance Company—Carrying on business in Province.**

A. held himself out as the agent in St. John of the Columbian Insurance Company, whose head office was in New York. His course of business was to receive applications for insurance addressed to the company, which he would forward to B., an insurance broker in Boston. The latter would send the application to the company, when, if it was accepted, a policy would be delivered to him, and the premium charged against him at the time. The policy was then forwarded by B. to A., who would deliver it to the assured, taking the premium note direct to himself, and sending to B. his own note for nine-tenths of the amount, (the balance being kept for commissions.) *Held*, That this was an indirect carrying on of insurance business in this Province by the company, contrary to the Act of Assembly 19 Vic. cap. 45, and that a premium note given to A. could not be collected; and also that the fact of the note being made to A., in no way distinguished this case from *Allison v. Robinson*. *Jones v. Taylor, Re Oulton*, 2 *Pug.* 391.

**Warranties—Condition that all statements contained in the application will be taken to be warranties on the part of the assured—Verbal agreement cannot alter.**

*See Evidence V. 10. Dingee v. Agricultural Ins. Co.*

**Loss of vessel—Probability of loss—Presumptive evidence.**

*See Evidence VI. 26. Pomares v. Minas Ins. Co.*

**Insurable interest—Sufficiency of.**

*See Insolvent Act 27. Parlee v. Agricultural Ins. Co.*

**Misrepresentation as to valuation—Abandonment and acceptance of—Pleading.**

*See Pleading II. 27. Lloyd v. Union Ins. Co.*

**Common Carriers—Liability of, to insure goods.**

*See Contract. McGoldrick v. Eastern Express Co.*

**Deposit of Policy of Insurance—Mortgage right—Equitable claim.**

*See Equity 3.*

**Action on Policy—Fire Insurance—Interest—Conditions—Preliminary Proof—Pleadings—Averments—Waiver.**

*See Pleading I. 37.*

**Assignment of Policy—Consideration to support promise by Insurer to Assignee.**

*See Pleading I. 39.*

**Defence—Deposit of Gunpowder contrary to Provisos Plea—Replication.**

*See Pleading II. 9.*

**Objecting to pay loss on different ground than want of preliminary proof—Waiver.**

*See Waiver.*

**Seal of Company when not necessary—President and Secretary—Firma Facie evidence of appointment.**

*See Evidence VI. 5.*

**INSURANCE BROKER.****Action by—Re-insurance—Money paid—Evidence.**

Policies of insurance effected by a broker, declared that preliminary proof and evidence of the loss were to be given to the broker, and payment of losses to be made within sixty days thereafter. The practice of the broker was to receive the premiums in money or notes, crediting the underwriters with the amount, whether actually paid or not, the assured being liable to him alone for the premium. Proofs of losses were furnished to the broker from time to time, and on being satisfied of their correctness, he paid the amounts, and the policies were cancelled. Half-yearly accounts were furnished by the broker to the underwriter, containing full particulars of all the risks, premiums, losses and charges, to which he made no objection until the accounts were rendered shewing the balance

claimed in this action. *Held*, in an action against the underwriter to recover the amount paid by the broker for losses, That the jury were warranted in inferring that the defendant had authorized the broker to decide upon the proof of loss in each case, and had assented to his decision. *Held* also, That the plaintiff could recover from the defendant the amount of premium of a re-insurance effected for him without proof of actual payment to the underwriter. *Ranney v. Gregory*, 1 *Han.* 152.

### INTEREST.

**Covenant to pay for improvements—Plaintiff entitled to interest on amount appraised.**

*See* Landlord and Tenant VI. 2.

1——Interest is not recoverable in the nature of damages in an action for money had and received, brought to recover an amount of duty illegally exacted at the Treasury. *Hammond v. Robinson*, 1 *Kerr* 295.

2——Interest cannot be recovered on a bond given to secure the payment of instalments of stock in a Joint Stock Company, under the Act 5 Wm. IV, cap. 48, though the bond is in a penal sum conditioned to secure the payment of a lesser sum at a certain day. *St. John Bridge Company v. Woodward*, 1 *Kerr* 29.

3——Where a verdict was obtained on a policy of guarantee, including interest up to that time, and a rule *nisi* for a new trial was granted, and afterwards discharged; interest was allowed on the amount of the policy, (but not on the amount of the verdict,) from the date of the verdict till the rule was discharged, under the Act 12 Vic. cap. 39, sec. 29. *Commercial Bank v. The European Assurance Society*, *Hil. T.* 1871.

4——Notice should be given of an application to be allowed interest on the affirmance of a judgment in error. *See Mills v. Vail*, 4 *All.* 629.

**Excessive Claim — Mortgage — Payment — Mortgagor allowed interest.**

*See* Mortgage 14.

**5—When final Judgment delayed.**

The plaintiffs obtained a verdict which was set aside and a new trial ordered. The decision was then appealed from to the Privy Council, who allowed the appeal. The plaintiffs having applied for interest since the verdict under the 12 Vic. cap. 39, sec. 29 (Consol. Stat. cap. 37, sec. 120) the application was refused. *McKay v. Commercial Bank*, 2 Pug. 324.

6———In an action on the case for unliquidated damages, the jury included interest in the verdict. *Held*, on an application for allowance of interest from time of verdict to judgment, that interest was improperly included and the application was refused. *Burpee v. Carvil*, 3 Pug. 285.

7———Interest on judgment against principal not allowed on entering up judgment against bail. *See* Bail 38. *Byron v. Flagg*.

8———In an action of trover the Court will not allow interest on the verdict where the signing of judgment is delayed by the opposite party. *N. B. Railway Company v. Murray*, 2 P. & B. 412.

**Interest from relationship.**

*See* Judge.

**INTERCOLONIAL RAILWAY.****Power to enter on private lands—Contractors.**

The Act 31 Vic. cap. 13, sec. 8 gives no power to persons who have contracted to supply sleepers to be used on the Intercolonial Railway, to enter on private lands, without the owner's permission, and cut timber for the purpose of supplying such sleepers. *Davidson v. King*, 2 Pug. 526.

**INTERLOCUTORY JUDGMENT.**

*See* Judgment by default—Practice V. 30, 31, 32—Practice VI. 15, 16, 17, 18—Practice VII. 10, 11, 12.

**INTERROGATORIES.**

*See* Evidence.

**INTESTATE ESTATE.**

*See* Heir at Law.

**INTOXICATING LIQUORS.**

*See* Justice of the Peace. (Summary Conviction.)

**INTOXICATION.**

**When ground for avoiding deed.**

*See* Deed I. 44. *Jones v. Calkin.*

**INTRUSION.**

1———If on the trial of an information for intrusion on Crown land, it appears that the Crown has been out of possession for twenty years, the defendant is entitled to a verdict on the general issue, under the Stat. 21, Jac. 1, cap. 14. *Rex v. Watson, Hil. T. 1828.*

2———The Crown granted to the defendant the right to occupy land for twenty-one years, unless the same should be sooner required by the Crown, on notice of which the grant was to cease and be void. *Held*, In an information for intrusion, after notice to the defendant, and refusal to give up possession, that no inquest of office was necessary to terminate his right, his removal not being founded on any breach of condition or forfeiture. *Reg. v. Hebert 2 All. 427.*

3———*Seemle*, That a notice to the defendant that the Government required the land, signed by the Surveyor-General of Crown Land, in his official character, was sufficient, without proof of any previous authority from the Government to give the notice. By subsequently laying out the land into lots and granting it, the Government recognized the authority of the Surveyor-General to give the notice. *Ibid.*

4———The right to the soil between high and low water mark in a navigable river being in the Crown, it has also the constructive possession, and may maintain trespass and intrusion against a person for erecting a building thereon; and the defendant cannot set up as a defence the public right of navigation over the place, his building not having been placed there in the exercise of any such right. *Reg. v. Taylor, Hil. T. 1862.*

5—*Quære*, Whether damages can be recovered, unless they are alleged in the information. *Ibid*.

**Evidence of title having vested in the Crown.**

*See* Evidence II. 38. *Regina v. Sullivan*.

**IRREGULARITY.**

*See* Practice VI. 45.

**ISLAND.**

*See* Accretion.

**Regulations respecting cattle on island.**

*See* Statute.

**ISSUE (NO PLEA.)**

*See* Practice VII.

**of writ.**

*See* Writ.

**INVENTORY.**

*See* Evidence VII. 4.

**JEOFAILS.**

*See* Error (Writ of.)

**JETTISON.**

*See* Insurance 36—Shipping Law.

**JOINT DEBTORS.**

*See* *Scire Facias*.

**Entitling notice of trial, where one only served.**

*See* Practice IX. 14.

**JOINDER OF PARTIES.**

*See* Action at Law XIII.

**Of Counts.**

*See* Pleading IV.

**JOINT LIABILITY.**

*See* Contract 9.

**All not served with process.**

*See* Practice VII. 8.—Practice IV. 5, 6.

**Infant not served—Judgment scire facias.**

*See* Infant 6.

**JOINT INDICTMENT.**

*See* Criminal Law.

**JOINT TENANCY.**

**Conveyance of land by grantor to himself and others.**

*See* Deed I. 26

**Cutting timber—Ownership.**

If one joint owner of land cuts timber on it adversely to his co-tenant, they become joint owners of the timber. The wrongful act of cutting does not divest the tenant of his interest in the property. *Godard v. Tuck*, 6 All. 370.

The law of State of Maine, relating to waste committed by one joint owner of land, considered. *Ibid.*

**JOINT TRESPASS.**

*See* Trespass II. 9, 10.

**Separate acts—Abandonment.**

*See* do. II. 8, 12, 13, 25.

**Joint Conversion.**

*See* Trover 24.

**JOINT STOCK COMPANY.**

*See* Assessment—Corporation.

**1—Calls—Lapse of time—Instalments.**

The Act 5 Wm. IV, cap. 48, incorporating the St. John Bridge Company, required thirty days' notice to be given of the calls for the payment of each instalment of the capital stock, and that no greater amount than ten per cent. should be called in at any one time. *Held* (Chipman, C. J., *dissentiente*), That the full time of thirty days must elapse between the time appointed for the payment of each instalment, and that it was not sufficient, in one notice, to call for payment of several instalments at intervals of less than thirty days. *Held* also (*per totam curiam*), That though one call could not be enforced for want of sufficient notice, it did not vitiate other calls in the same notice, where the full time was given. *St. John Bridge Co. v. Woodward*, 1 Kerr 29.

**2—Right to sue for calls—By-Laws.**

An Act incorporating a Joint Stock Company, directed that the stock should be divided into two hundred shares,

to be secured in such manner as the by-laws of the Company should direct, and should be paid in such sums, and at such times as the Directors should appoint. *Held*, That it was not essential to the right of the Company to sue for calls of stock, that by-laws for securing the same should be made, provided the Directors who made the calls were duly appointed. *Portland and Lancaster Steam Ferry Co. v. Pratt*, 2 *All.* 17.

### **3—Notice—Newspaper—Time.**

The Act of Incorporation required the first meeting of the Company to be called by A., by giving notice in one or more of the newspapers published in St. John, "for not less than three consecutive weeks immediately before the day appointed." *Held*—1st. That a newspaper containing such a notice, and having the name of A. thereto, was evidence of the notice, and that A. having attended the meeting, it would be presumed that the notice was published by his authority; 2nd. That it was not necessary that three weeks should elapse between the publication of the first notice and the day of meeting; but that a publication in the newspaper for three consecutive weeks was sufficient; 3rd. That it would not be presumed that the newspaper was published more than once a week—that fact (if material) should have been shewn affirmatively. *Ibid.*

### **4—Annual Meeting — Election— Presence of Stockholders.**

Where an Act of Incorporation required that an annual meeting for the choice of Directors should be held at such time "as by the laws and regulations of the corporation should be appointed," an election made at a meeting held under an order of the Directors, at which meeting all the stockholders were not present, is invalid. The law regulating the annual meeting should be made by the stockholders, and not by the Directors merely. *Semble*, That in the absence of any by-law on the subject, an election at a meeting so called, at which all the stockholders were present, and voted, would not be void. *Ibid.*



**5—Membership.**

A person named in the act of incorporation and in the list of subscribers, who never authorized his name to be used, or held any shares in the Company, ceases to be a member thereof after the first meeting to organize the Company, and is therefore not disqualified as a juror in an action brought by them. *Ibid.*

**6—Liability to rates.**

If a Joint Stock Company owns real estate in several Parishes, it is rateable under 1 Rev. Stat. cap. 53, as a resident of that Parish in which its principal business is carried on, and as a non-resident in the other Parishes. *Ex parte St. John Suspension Bridge Co.*, 3 All. 190.

**7—Officer summoning Jury — Disqualification as Stockholder.**

In an action for calls on stock in a Company the officer who summoned the jury was a stockholder, (the whole amount not being paid up,) but before receiving the *venire*, transferred his stock to the President of the Company. The act of incorporation declared that no shareholder should be entitled to transfer his stock unless all calls were paid. *Held*, That he had not divested himself of his interest as a stockholder. *Woodstock Railway Co. v. Tupper*, 1 Han 454.

**8—Right to sue for Assessments—Remedial Act.**

The plaintiffs were incorporated by Provincial Act, 27 Vic., cap. 43, for the purpose of constructing a railway from St. John to the boundary of the United States—the capital stock to be two millions of dollars, and the Company to proceed to locate and complete the road as soon as \$50,000 of the stock were paid in. The Directors were authorized to make equal assessments on the shares from time to time, as they might deem necessary, to be paid to the Treasurer, and in case any subscriber for stock neglected to pay the assessment on his shares for thirty days after notice, the Directors might order his shares to be sold at auction, and in case of any deficiency, he should be accountable to the Company for the balance. By Act 32

Vic. cap. 54, to amend the act of incorporation, after reciting that it was doubtful whether the subscribers for shares were legally liable to pay assessments unless the whole amount of the capital stock has been subscribed for, and the \$50,000 paid in, and also, whether the notices of assessments had been given in accordance with the act of incorporation,—it was enacted, 1. That the subscribers for stock should be liable in the same manner and to the same extent as if the whole capital stock had been fully subscribed, and as if the \$50,000 had been paid in, in the manner directed by the act of incorporation, and as if all assessments on the shares and the notices given thereof, had been made and given according to the said act. 2. That to entitle the Company to recover against any stockholder, two months' notice of the assessment should be published in a newspaper, and after the expiration of that time, the Company should be entitled "to sue for, recover, and receive from any stockholder the amount due for unpaid subscribed stock *in the same manner* as if the calls for assessment had been regularly made" in accordance with the requirements of the act of incorporation. *Held*, 1. That the Act 32 Vic. cap. 54, was not *ultra vires*, under the "British North America Act, 1867," sec. 92, sub-section 10; 2nd. (per Ritchie, C. J., Allen and Weldon, J. J., Fisher, J., *dubitante*) That an action of debt could not be maintained under the Act of Incorporation, for the assessments on stock; but that the proceeding by sale of the shares must be adopted; 3rd. (Fisher, J., *dissentiente*) That the preamble of the Act 32 Vic. cap. 54, shewed that the object of the Legislature was, not to alter the remedy given by the Act of Incorporation for the recovery of assessments, but to remove other difficulties; and that the words of section 2 did not give the Company a right to sue for assessments. *European and North American Railway Co. v. Thomas*, 1 *Pug.* 42.

### **9—Stockholders of Bank—Liability.**

The stockholders of the Westmorland Bank, by their charter, in addition to the liability of the stock held by

them for payment of the debts of the bank, are liable in their private and individual capacity for an amount equal to the sum of their stock. *McKenzie, Curator of Westmorland Bank v. Wiswell*, 1 *Han.* 508.

**10—Executors investing in Bank Stock in their own names—Liability—Register.**

The executors of the estate of C. invested a portion of its funds in bank stock in their own names, but for the benefit of the estate, by which the dividends were received. After their death their representative, by writing, agreed to transfer the stock to the widow of C., who had taken out letters of administration *cum testamento annexo de bonis non*. The stock certificates were handed over to her and she afterwards received the dividends, but no transfer was made on the books of the bank as required by its charter and by-laws. The bank suspended, and the estates of the executors were placed by the Judge on the list of contributories for the stock standing in their names on the register. *Held*, That they being *prima facie* legally liable, the Judge was right in not altering the register by substituting the party equitably entitled to the stock. *In re President, &c., Westmorland Bank*;—*Ex parte Allison*, 1 *Han.* 506.

**11—Judge's order—Winding-up Act—Evidence.**

A Judge's order settling the list of contributories under the Winding-up Act (27 Vic. cap. 44) is only *prima facie* evidence of liability, and the defendant, in an action brought against him to recover a call on the stock, may give evidence to shew that he is not a stockholder. *McKenzie v. Seaman*, 1 *Han.* 621.

**12—Action for calls—Judge's order *prima facie* evidence of liability.**

In an action against a Stockholder for calls under the Winding-up Act, the order of a Judge of the Supreme Court authorizing such calls, in *prima facie* evidence of the defendant's liability. *McKenzie v. Scovil*, 2 *Han.* 6.

**13—Judicial Notice—Signature of Judge.**

A Judge at *Nisi Prius* is bound to take judicial notice of

the signature of another Judge of the Court, to an order made under the Winding-up Act. *Ibid.*

**14—Taking Promissory Note from Stockholder for assessment.**

A Joint Stock Company may take a promissory note from a stockholder for an amount due by him on an assessment on his stock,—there being nothing in the act of incorporation to prohibit it. *St. Stephen's Branch Railway Co. v. Black*, 2 *Han.* 187.

**15—Provisions for assessment of damages—Appointment of arbitrators—Procedure towards assessment—Agent—Sent—Rights of parties—Lessee for years—Owners.**

The Albert Mining Company Act, (15 Vic. cap. 87, sec. 8,) declared that if the Company deemed it necessary to enter on the private property of any person for the purpose of carrying on their mining operations, they should allow the owners of such land such compensation by way of rent or otherwise, as might be agreed on, for the damages such owner might sustain by reason thereof, and if they should not be able to agree with the owners of the soil as to the amount of compensation, then the amount should be determined by three arbitrators, one to be chosen by the Company and one by the owner of the land, which arbitrators should choose a third; and if the owner of the land should decline making such agreement, or appointing an arbitrator, then the Company should make application to the Supreme Court or a Judge, stating the grounds of such application, and such Court or Judge was thereby required from time to time on such application to issue a writ to the Sheriff of the County, commanding him to summon a jury to assess the sum of money or annual rent to be paid as compensation to the owner of the land. *Held*, 1. That in order to justify the issuing of a writ, it must be shewn to the Judge by legal evidence, that an application for an agreement and arbitration had been made by the Company to the owner of the land and declined; and that an affidavit of such an application sworn before a British Consul in a foreign country, was not legal evidence. 2. That the

authority of an agent of the Company to make the agreement with the owner of the land and appoint an arbitrator, need not be under the Company's seal. 3. That the word "owner" applied to a lessee for years of the land. 4. That the jury in assessing the damage, might either award a sum in gross or an annual rent. 5. That if the preliminary notices to the owner of the land were proved, the writ might issue without a summons to the owner to shew cause. *Ex parte The Albert Mining Company*, 3 All. 39.

The 10th section of the act declared that nothing in the act contained should interfere with the rights of the respective parties between whom suits were pending for anything which had happened or been committed before the passing of the act. *Held*. That an owner of land who had a suit pending for treepass by mining operations on his land at the passing of the act, was not thereby excluded from the operations of the 8th section. *Ibid*.

**Authority to cut down street.**

*See* Railway Company.

**South Bay Boom Company—Right to receive boomage.**

*See* Boomage.

**Requisite notice of assessment to entitle suit to be brought.**

*See* Assessment, 21. *E. & N. A. Railway Co. v. Dunn*.

## JUDGE.

- I. REVIEWING DECISION OF.
- II. POWER AT CHAMBERS.
- III. DISCRETIONARY POWER AT TRIAL.
- IV. CERTIFICATE OF JUDGE.
- V. MISCELLANEOUS.

### I.

REVIEWING DECISION OF. (*See* Trial.)

1—The Court will not review the decision of a Judge refusing an amendment at *nisi prius*, unless satisfied that injustice has been done by his refusal. *See McAllister v. Day*, 4 All. 37.

## II.

## POWER AT CHAMBERS.

2———A Judge at Chambers has power to grant further time to plead in abatement. *See Ross v. Hammond*, 3 Kerr 631.

3———Where damages were assessed by Judge at Chambers in a default cause on an insufficient affidavit as to some items, the Court reduced the assessment to amount warranted by affidavit. *Scoullar v. Webb*, 1 Kerr 520.

**Continuation of writ—Arrest.**

Process issued within a year after the swearing of the affidavit, arrest made on a writ which was a continuation of the first writ, good. Judge has power to order filing *nunc pro tunc*. *Palmer v. Densmore*, 2 Pug. 150.

## III.

## DISCRETIONARY POWER AT TRIAL.

**Discretionary power as to reception of evidence at trial.**

*See Evidence VIII—Nisi Prius—Trial.*

**Power to prevent Counsel addressing Jury.**

*See Trial.*

**Power in Judge to make an order for full costs to plaintiff when verdict for less than sum offered.**

*See Judgment II. 10.*

**Judge has no power to compel plaintiff to reply to plea at trial.**

*See Replevin 12.*

## IV.

## CERTIFICATE OF JUDGE.

**4—Finality of decision.**

When a Judge having a discretionary power, grants an order to the plaintiff on the trial of a cause for full costs, his decision is final. *Sturks v. Malcolm*, 3 Kerr 581.

**5—Time—Application.**

An application to the Judge who tried the cause for a certificate to deprive an acquitted defendant of costs under

Act of Assembly 7 Wm. IV. cap. 14, sec. 24, is not too late if made before the judgment is signed, though nearly two months after the verdict. *Crane v. Cunard*, 3 Kerr 417.

6 ———— When a trespass is committed under a claim of title, or with the intent to oust the plaintiff from the possession of the land, the Judge may certify under the Statute 22 and 23 Chas. II., cap. 9, to entitle the plaintiff to full costs. *Morrison v. McAlpin*, 2 Kerr 36.

Statute 43 Eliz. cap. 6, in force in this Province. *See* British Statutes.

**Fees on Entry of Cause.**

*See Doe v. Christopher*, 2 All. 420.

**7—Cannot be made a rule of Court.**

A Judge's certificate that there was no reasonable cause for bringing action in Supreme Court, cannot be made a rule of Court. *Horner v. Crookshank*, 4 All. 375.

V.

MISCELLANEOUS.

**Relationship—Disqualification.**

A remote relationship of a Judge to one of the parties to a suit does not disqualify him from hearing the cause. *Cotton v. Stack*, 3 Pug. 424.

**JUDGE (COUNTY COURT.)**

*See* County Court Judge.

**JUDGE'S NOTES.**

*See* Evidence VII. 7.

**JUDGE'S ORDERS.**

**Application to rescind.**

*See* Practice V. 5.

**Prima facie evidence of defendant's liability as stockholder.**

*See* Joint Stock Company 11 and 12.

**Finality of order granting leave to appeal.**

*See* Practice V. 5 a.

**Necessity of rescinding Judge's order for discharge of joint debtor before issuing execution.**

*See* Execution IV. 19.

**Order for discharge of debtor.**

Production of an order of Judge of County Court, valid on its face, a sufficient justification to Sheriff. *See* Escape 4.

**Insufficient affidavit for order to hold to bail—Application to rescind Judge's order—Previous application pending on other matter.**

*See* Arrest 10.

**1—Judge—Nisi Prius—Order for trial of causes—Authority to make—Counsel's Duty.**

A Judge at *Nisi Prius* has authority to make such order at the time of trial of the causes as to him may seem requisite for the effectual despatch of the business of the Court, and it is the duty of the Attorney and Counsel in a cause to attend until the case is disposed of. It is no ground for setting aside a verdict on the score of irregularity, that a cause has been tried out of its order in consequence of several causes standing on the docket before it having been put off by consent to a future day. *Bowes v. Sutherland*, 2 *Kerr* 1.

**Judge has no power on trial in replevin to compel plaintiff to reply to plea added.**

*See* Replevin 12.

**2—Order granting leave to plead and demur and directing issue in law to be tried first—Whether can be made *ex parte*.**

A Judge at Chambers made an *ex parte* order allowing defendant to plead and demur to declaration, and directing that the issue in law should be first disposed of. On application being made to the Court to rescind this order. *Held*, per Allen, C. J., and Duff, J., That that portion of the order which directed that the issue in law should be first disposed of, should not have been granted without a summons; but that a judge might in many instances where the case was clear, make an order *ex parte* for leave to plead and demur, and his doing so or not should be governed by the circumstances of each case. But per Wetmore, J., that no portion of the order should have been made without giving



the other side an opportunity of being heard. Weldon, J., was of opinion that the whole order was rightly made *ex parte*. *Bell v. Moffat*, 2 P. & B. 151.

**3—Attachment—Judge's order for—Filing.**

It is not necessary that the Judge's order for attachment should be filed before attachment issues. *Colwell v. Robertson*, 1 P. & B. 481.

**Non-resident—Judge's order—Necessity of obtaining.**

*See Practice VI. 49. Mitchell v. Lawther.*

**4—Ex parte order—Setting aside of.**

Where a Judge makes an *ex parte* order, an application should be made to him to set it aside before applying to the Court. *Jarris v. Burns*, 3 Pug. 327.

**5—**It is not necessary to serve a Judge's order and demand costs before moving to make it a rule of Court. *Bell v. Moffat*, 2 P. & B. 406.

**6—Attachment—Setting aside of order.**

Where attachment was issued during the progress of a cause, on the order of a Judge. *Held*, That the Judge's order must be rescinded before the attachment could be set aside. *McLellan v. Milmore*, 1 P. & B. 291.

**7 Entry of cause—Judge's order—Statute of limitations.**

A writ was issued in this cause in May, 1872, returnable in the following Trinity Term. The process was issued in order to save the Statute of Limitations, and was returned *non est*. About the 6th of August then next, the writ was filed with the clerk, but no entry docket was filed. At a subsequent stage in the cause the plaintiff obtained from a Judge at Chambers, an order for leave to file the entry docket as of Trinity Term, 1872. A motion being made to the Court to set aside this order, the application was refused. *Taylor v. Gerow*, 2 Pug. 364.

**JUDICIAL ACTS.**

*See University of New Brunswick—Commissioners.*

**JUDICIAL NOTICE.**

**1—Place.**

The Court cannot take judicial notice that a vessel

lying "near the mouth of Richibucto Harbor" is in the County of Kent. *DesBrisay v. The Commissioners of the E. & N. A. Railway*, 1 *Han.* 48.

2—It will not be judicially intended that a deed purporting to have been made at Birmingham, was made at Birmingham, England. *Hasluck v. McMaster*, C. *Ms.* 4.

3—It cannot be judicially noticed that an Hotel is a place for selling liquors.

*See Justice of the Peace IV.* 15.

#### 4—Person.

The Court cannot take judicial notice that the person who signs a certificate of registry, endorsed upon a deed, was not the Registrar at the time the deed was recorded: and in the absence of any such proof, it must be presumed that the Registrar rightly certified. A certificate dated in 1866, stated that the deed had been registered the 29th April, 1886. *Quære*, Whether the certificate should not have been made at the time the deed was registered. *Doe on the demise of Robinson v. Chassey*, 1 *Han.* 50.

5—Where the certificate of proof of the execution of a deed was subscribed "Geo. D. Ludlow," without any description of his official character, either contained in the certificate, or annexed to the signature. *Held*, (per Chipman, C. J. and Parker, J., Carter, J., *dissentiente*,) That the Court should take judicial notice that a person named Geo. D. Ludlow was Chief Justice of the Province at the time the deed appeared to have been executed. *Watson v. Hay*, 3 *Kerr* 559.

#### 6—Order of Judge under Winding-up Act.

A Judge at *nisi prius* is bound to take judicial notice of the signature of another Judge of the Court. *McKenzie, Curator, &c., v. Scovil*, 2 *Han.* 6.

#### 7—Judgment Roll.

*Quære*, Whether the Court could judicially notice an endorsement on a judgment roll of a rule setting aside the judgment. *See Wilson v. Andrews*, 1 *All.* 715.

#### Public Law—Authority to repair Streets.

*See Pleading I.* 62.

**8—Note payable in Boston.**

The court will not take judicial notice that a note payable in Boston is payable in the United States. *Cushing v. Gordon*, 6 All. 524.

**JUDGMENT.****I. GENERALLY.****II. OFFER TO SUFFER JUDGMENT BY DEFAULT.****III. JUDGMENT (FOREIGN.)****IV. JUDGMENT AS IN CASE OF NON-SUIT.****V. JUDGMENT BY DEFAULT.****I.****GENERALLY.****Plaintiff's remedy on, not lost by proceeding against sheriff.**

*See Discharge 2.*

**1—Satisfaction of—What amounts to.**

Where the defendant, after judgment, endorsed a note of a third party to the plaintiff, to be collected by him, and the proceeds applied in payment of the judgment, accompanied also by a request that the plaintiff would carry on the suit against such third party in his own name; and on the plaintiff's suing such third party, the suit was settled between them by the plaintiff receiving a sum of money on account, and taking a new note in his own name for the balance, of which he informed the defendant. *Held*, That this was a satisfaction of the original judgment. *Sewell v. Burpee*, 3 Kerr 363.

**2—Suspension of remedy on—Taking negotiable note.**

Where a negotiable note is given as collateral security for a debt secured by a judgment on a warrant of attorney, the remedy on the judgment is suspended until the maturity of the note; and where the creditor had transferred the note, and it had been mislaid, the execution on the judgment was suspended until the defendant was indemnified against his liability on the note. *Hardy v. Price*, 3 All. 264.

**3—Lien.**

A judgment is not such a lien on land as to prevent

the judgment debtor from conveying the legal estate and seisin to a third person. (*See Act 8 Geo. IV. cap. 87.*) *Doe dem. Peabody v. McKnight, Ber. 876.*

**4—Enforcing judgment—Resort to equity.**

A judgment creditor cannot file a bill in equity to enforce his judgment against the lands of his debtor, until he has taken all necessary proceedings to enforce his judgment at law, and is unable there to obtain the relief to which he is entitled. *Black v. Hazen, Hil. T. 1871.*

**5—Subsequent creditor—Rights—No fraud.**

A subsequent judgment creditor of the defendant has no right to complain of an irregularity in the plaintiff's judgment, as that it was signed too soon. It is only in case of fraud that a subsequent creditor can apply to set aside judgment. *Robinson v. N. B. and Canada Railway and Land Co., 5 All. 680.*

**6—Judgment nunc pro tunc—Lost roll.**

The Court refused to allow a judgment roll to be filed *nunc pro tunc* on the ground that a former judgment roll had been lost or mislaid, without satisfactory proof that such roll was once actually in existence. *Shedden v. Smith, C. Ms. 186.*

**7—Setting aside—Conditions imposed.**

On setting aside an irregular judgment and execution, it was made a condition that defendant should not bring an action of trespass for the levy, the plaintiff's attorney having proceeded under a mistake of the practice. *Fleming v. Shaw, C. Ms. 117.*

**8—Inferior courts—Judgment not conclusive.**

The judgments of inferior tribunals are not conclusive, and their regularity may always be inquired into in any collateral proceeding. A justice of the peace has no power to sign a judgment in favour of plaintiff in a cause, unless the plaintiff, or some person on his behalf, appears at the return of the summons. And when neither party appears at the return of the summons, the suit is at an end. *Wright v. Parlee, 3 Pug. 381.*

**9—Judgment not conclusive—Fraud.**

J. S., executor of the estate of H. S., gave a confession of judgment in a suit brought against him by the trustees of himself, as an absconding debtor. On an application being then made by him to a Judge of Probates for a license to sell the real estate, the latter decided that the judgment was obtained by fraud, and refused to grant a license. *Held*, That the judgment was not conclusive, and fraud being shewn, the judge rightly decided to refuse the application. *Ex parte Simpson*, 2 *Pug.* 142.

**10—Judgment improperly obtained—Settlement of action.**

Plaintiff placed in his attorney's hands, for collection, two promissory notes, made by the defendant, for £20 each, only one of which was then due. An action was commenced, and before the writ was returnable, the other note fell due, and the action proceeded for both. The plaintiff, believing the action was brought on the first note only, received from the defendant a horse valued at £25, in satisfaction of the note and costs, and gave him a receipt, stating that plaintiff had received payment in full for an action brought by him against the defendant upon "a promissory note," (describing it.) The attorney not having been informed of this, proceeded to trial, and obtained a verdict for the amount of both notes—the cause being tried as undefended—and signed judgment. *Held*, That the delivery of the horse was a settlement of the action; that it was the duty of the plaintiff to inform his attorney of the settlement; and that the judgment was improperly obtained. *Mitten v. Parlee*, 6 *All.* 152.

**11—Signing Judgment—Vacation—C. P. L. Act.**

Section 56 of C. L. P. Act of 1873, providing a vacation (line repealed,) applied as well to actions begun before as after the passing of the Act, and where a verdict in a suit commenced before the Act was rendered, after the 20th August, it was *held*, that the time for signing judgment did not begin to run till the 1st October. *Jones v. Botsford*, 3 *Pug.* 489.

**Setting off judgments of different notice.**

*See* Set-off.

**Setting Aside.**

*See* Practice VI.

**Set-off.**

*See* Set-off.

**Amendment.**

*See* Amendment III.

**Arrest of judgment.**

*See* Practice XIII.

**Judgment on bond and warrant of attorney.**

*See* Warrant of Attorney.

**Record of judgment—Evidence as to date of bond.**

*See* Evidence II. 18.

**Judgment—Action on evidence—Identity.**

*See* Evidence II. 29.

**A judgment changes the nature of a debt.**

*See* Set-off 9.

**A judgment by restitution under 1 Rev. Stat. cap. 126, sec. 30, no bar to action.**

*See* Landlord and Tenant VII. 5.

**Compelling assessment to satisfy judgment.**

*See* Mandamus. *Ex parte Devoe*.

## II.

### OFFER TO SUFFER JUDGMENT BY DEFAULT.

1 ————An offer, under the Act 18 Vic. cap. 9, to suffer judgment by default, must be signed by the defendant in the cause, and not by his attorney. *Wetmore v. DesBrisay*, 4 All. 356.

2 ————An offer to suffer judgment by default, under the Act 18 Vic. cap 9, may be made before declaration filed. *Gibson v. Bateman*, 4 All. 598.

3 ————Where the plaintiff's attorney was unable, in consequence of the non-payment of Court fees, to file an acceptance of an offer to confess judgment within the time

allowed by the Act 18 Vic. cap. 9, and a judge's order was made granting him further time, the Court refused to set it aside. *Carrick v. McLeod*, Trin. T. 1864.

4——Where a defendant, after giving notice and particulars of set-off files an offer to confess judgment under the Act. 18 Vic. cap. 9, without withdrawing the set-off, or giving notice that the offer was made without reference to it, it is *prima facie* an admission that the sum stated in the offer, is the balance due the plaintiff after giving the defendant credit for the amount of the set-off. *Turner v. Hamilton*, 5 All. 156. See costs. IX.

5——The plaintiff, by filing an acceptance of an offer to confess judgment, signed by the defendant's attorney, and taxing the costs, up to that time, does not waive the objection to the want of defendant's signature to the offer; but may afterwards treat the offer as a nullity and proceed to trial *Wilson Maxwell*, 6 All. 219.

6——Where the defendant, before pleading, filed an offer, under the Act. 18 Vic. cap. 9, to suffer judgment by default for \$250. which the plaintiff did not accept, and the defendant then pleaded to the action and gave notice of set-off, and the plaintiff recovered a verdict, (after allowing an amount for the defendant's set-off,) for less than the sum tendered. *Held*, That the tender must be taken with reference to the state of the pleadings at the time, and, not having been renewed after the notice of set-off, that the plaintiff was entitled to full costs. *Miller v. Lakeman*, 6 All. 510.

7——Defendant in trover, about a month after the conversion, offered to confess a judgment under the Act 18 Vic. cap. 9, for \$18, which the plaintiff did not accept. On the trial, (upwards of two years afterwards,) plaintiff recovered a verdict for \$19, a part—\$15.30 being found by the jury as the value of the goods, and the balance for damages, in the nature of interest. *Held*, That as the amount tendered was more than the value of the goods and interest up to that time, the plaintiff was only entitled to

costs up to the time of the offer, and that the defendant was entitled to the subsequent costs. *Belyea v. Stephenson*, Mich. T. 1866.

Offer to suffer judgment in suit brought under 92nd and 98rd sections of Insolvent Act of 1869. See Insolvent Act of 1869. 8.

### **8—Offer to suffer Judgment by default—Costs.**

Where a plaintiff accepts an offer to suffer judgment by default under Con. Stat. cap. 37, sec. 127, he is entitled to sign judgment for the amount of the offer and the full costs.

Where the offer is for a sum within the jurisdiction of the County Court, the plaintiff may shew by affidavit that the action was properly brought in the Supreme Court. *Peppers v. Johnston*, 1 P. & B. 502.

9—Where a new trial is made being silent as to costs, and before second trial defendant offers to suffer judgment by default under 18 Vic. cap. 9, and the offer is accepted, plaintiff is not entitled to costs of the first trial. *Ryan v. James*, 2 Pug. 219.

10—Where, after a tender of judgment under the Act 18 Vic. cap. 9, the plaintiff recovers a verdict for less than the amount offered, the judge who tried the cause has power to make an order allowing the plaintiff full costs. *McLeod v. DesBrisay*, 6 All. 517.

See Costs IX.

## **III.**

### **JUDGMENT (FOREIGN).**

#### **1—Not debt of record.**

A foreign judgment is not a debt of record, but only evidence of a debt; and the simple contract on which it is founded, is not merged in it. *Fergus v. Wardlaw*, 3 Kerr 665.

#### **2—Pleading in Bar.**

The judgment of the Canadian Court in a suit between the hired men and the plaintiff relative to timber, is no bar to an action against the defendant for a tort commit-



ted by him before the timber came within the jurisdiction of Canada. *McMillan v. Ritchie*, 2 All. 242.

If the proceedings in a foreign Court do not operate as an estoppel, this Court may inquire into the grounds of the judgment. *Ibid.*

The whole of the proceedings in a suit in a foreign Court should be produced to prove the judgment. *Ibid.*

### **3—Action on—Seal—Proof—Jurisdiction.**

No action will lie in this country on a foreign judgment, if the defendants were not resident within the jurisdiction of the foreign Court, and had no property or agent there, and were neither served with process in the foreign country, nor defended the suit; though they were served in this country with notice of the pendency of the suit, and the judgment may have been obtained according to the practice of the foreign Court in similar cases. *Cyr v. Sanfacon*, 2 All. 641.

It is sufficient that the seal affixed to a foreign judgment is the seal used by the foreign Court, though it purports on its face to be the seal of a different Court from that in which the judgment was obtained. *Ibid.*

*See Schibsy v. Westenholz et al.*, 6 Q. B. 155 L. R.

### **4—Authentication of.**

The judgment of a foreign Court is not sufficiently authenticated by a copy certified to be correct by the clerk, although the clerk's signature and authority are verified by a certificate annexed thereto under the hand of the Judge and the seal of the Court; the copy of the judgment itself should be authenticated under the seal of the Court. *Pool v. Hill*, 2 Kerr 184.

### **Judgment of Court of King's Bench in England—Proof of.**

*See Evidence II.* 17.

### **5—Impeaching of.**

A foreign judgment, whether in *personam* or in *rem*, may be impeached in our Courts by extrinsic evidence shewing that the Court which Pronounced it had no juris-

diction, or that it was obtained by fraud. Therefore a decree of divorce obtained in a foreign Court on a false affidavit that the party seeking it was, at the time of the suit, and had been for a year preceding, a resident of such foreign country, when in fact he was during that time a resident of this province, is void. *Regina v. Wright*, 1 P. & B. 363.

## IV.

**JUDGMENT AS IN CASE OF NON-SUIT.**

I. MATTERS RELATING TO PRACTICE.

II. ANSWERS—EXCUSE—SUFFICIENCY—INSUFFICIENCY.

III. DISCHARGING RULE ON PEREMPTORY UNDERTAKING—ANSWERS—ENLARGING RULE.

## I.

## MATTERS RELATING TO PRACTICE.

**1—Entertaining Motion—Compliance with Rule of Court.**

The Court will not entertain motions for judgment as in case of non-suit unless the requisites of the rule of Hilary Term 6 Wm. IV. have been complied with. *Harris v. Beaumont*, 2 Kerr 172.

**2—Remanet.**

Where a cause has been entered for trial, and made a remanet, the defendant cannot move for judgment as in case of a non-suit for a subsequent default. *Embree v. Hatheway*, Trin. T. 1827.

a—Where a cause has been taken down to trial and made a remanet, either by special order of the Judge or for want of time to try all the causes on the docket, the defendant cannot obtain judgment as in case of a non-suit for a subsequent default. *Mills v. Leach*, 4 All. 355.

b—Where a cause has been entered for trial at one circuit and made a remanet by order of the Court—judgment as in case of a non-suit cannot be signed for not proceeding to trial at a subsequent circuit pursuant to notice. *McLelland v. Masson*, 2 Pug. 3.

**c—Cause improperly entered—Made a remanet.**

A cause being improperly entered on the docket at *nisi prius*, the defendant's attorney should take steps to have it struck off as soon as it comes to his knowledge, otherwise he cannot move for judgment as in case of non-suit, for not proceeding to trial pursuant to notice, if the cause has been made a remanet. *McLelland v. Masson*, 2 *Pug.* 59.

**3—Not proceeding to second trial.**

Where a cause has been tried, and the verdict set aside, judgment, as in a case of a non-suit, cannot be granted for not proceeding to a second trial. *Turner v. Crane*, *Trin. T.* 1881.

**4—Subsequent notice after remanet.**

Where a plaintiff has once taken down his cause to the assizes, and it has been made a remanet, the defendant cannot obtain judgment as in case of a non-suit, though the plaintiff may have given a subsequent notice of trial, on which he has made default. *Bennett v. Stockford*. 1 *Kerr* 300.

**5—Fresh default.**

A cause was entered for trial at the Circuit, in 1865, and struck off, and the plaintiff paid the costs of the day. No notice of trial was given for the next circuit. *Held*, That this was a fresh default, and that the defendant was entitled to judgment as in case of a non-suit. *Thomson v. Keith*, 6 *All.* 509.

**6—Time.**

There is no limit of time for a defendant to move for judgment as in a case of a non-suit, nor is a term's notice necessary where four terms have elapsed without any proceedings. *Scoullar v. Payson*, *Trin. T.* 1883.

**7—Cause postponed with assent of defendant.**

If a plaintiff has once taken his cause down to trial, and the trial be postponed to the next circuit with the assent of the defendant, the defendant is not entitled to judgment as in a case of a non-suit for not then proceeding to trial. *Gilbert v. Dunham* 2 *Kerr* 361.

**8—Two defendants—Settlement with one.**

Where two defendants appeared by the same attorney and pleaded jointly, and afterwards one of them settled with and paid the plaintiff, the other defendant cannot move for judgment as in case of a non-suit. *McGlyn v. Falconer*, 5 *All.* 108.

**9—Trial by record—Notice—Statute not applicable.**

Where the plaintiff has given notice of trial by the record, but failed to bring the cause on for trial, the defendant cannot obtain judgment as in a case of a non-suit. The Statute only applies where the plaintiff could be non-suited on the trial. *Kelly v. Coughlan*, 3 *Kerr* 104.

**10—Summoning Jury—Number.**

A *venire* to summon 12 jurors to try a cause is correct, but as the number stated is not for the officer's guide in summoning, he should summon 24. If he only summons 12, and for that reason the cause is not tried, the plaintiff is not liable for costs of the day, or to judgment as in case of a non-suit. *Hazen v. Bryson*, 2 *All.* 580.

**11—Service of notice.**

A notice of motion for judgment, as in case of non-suit, must be served on the plaintiff's authority. Service on the plaintiff is insufficient. *Murphy v. Close*, 3 *All.* 83.

**11 a**———What will be deemed a sufficient service of notice of motion, for judgment as in case of non-suit, on the plaintiff's attorney who has left the Province. See *Wheelock v. Alden*, 2 *Kerr* 172.

**12—Offer to suffer judgment.**

A rejected offer to suffer judgment by default, under the Act 18 Vic. cap. 9, does not prevent the defendant from obtaining judgment as in case of a non-suit. *Thomas v. Demill*, 3 *All.* 407.

**13—Replevin—Not grantable in.**

Judgment as in a case of a non-suit cannot be granted in replevin. *McGeehan v. Hale*, 3 *All.* 507.

Where such a judgment was inadvertently granted, the nature of the action not having been stated, the Court set

it aside, notwithstanding the omission of the plaintiff's counsel to take the objection on the motion for the judgment. *Ibid.*

**14—Demurrer pending.**

A party is not in a condition to move for judgment, as in case of a non-suit, for not proceeding to trial pursuant to notice, where a demurrer is pending to one part of the cause of action. In such cases the motion may be for costs occasioned by not proceeding to trial pursuant to notice; but this cannot be done in a proceeding of which fourteen days notice has been given to move for judgment as in case of a non-suit. *Kinnear v. Watts*, 3 Kerr 300.

**15—Venue—Affidavit.**

The affidavit to found a motion for judgment, as in case of a non-suit, for not proceeding to trial according to the practice of the Court, must state where the venue is laid. *Doe v. Wry*, 2 All. 311.

**16—Double motion—Costs of day.**

Where a motion for judgment, as in case of a non-suit, was pending, the Court discharged with costs, a motion for costs of the day for the same default. *Stevens v. Hamilton*, 1 Han. 335.

**17—Defect in affidavit.**

The Court refused without costs, a rule for judgment *quasi* non-suit, for not proceeding to trial pursuant to notice, where the name of the Commissioners was omitted from the *jurat* in the copy of the affidavit stating the plaintiff's default, served on plaintiff's attorney. *Belyea v. Hamm*, 2 Han. 26.

**18—Joinder of issue—Affidavit.**

An affidavit stating that issue was joined as of Michaelmas term last past is *prima facie* sufficient to support a motion for judgment, as in case of a non-suit. *Lancy v. Siddal*, 3 Kerr 233.

**19—Terms clapsing.**

There is no arbitrary rule that two terms or two assizes should pass after issue joined in order to sustain

a motion for judgment as in case of a non-suit for not proceeding to trial, according to the practice of the Court, but the plaintiff is bound to proceed to trial at the first *nisi prius* held next after the term immediately succeeding that in which issue is joined, provided there is sufficient time to give notice of trial. (*See next cases.*) *Sprague v. Matthews*, *Ber.* 433.

**20**———A plaintiff is bound to try his cause at the first Circuit after issue joined, unless issue be joined of the term immediately preceding. *Samuel v. McAndrews*, *Ber.* 278.

**21**———Where issue is joined in vacation, it refers to the next subsequent and not the preceding term, although joined as of the preceding term; in such case therefore judgment as in case of a non-suit cannot be moved for until two terms have elapsed after issue joined. *McDonald v. Ryder*, 2 *Kerr* 645.

**22**———Where issue is joined in vacation, two subsequent terms must elapse before judgment, as in case of a non-suit for not proceeding to trial pursuant to the practice of the Court, can be obtained. *McClelan v. McClelan*, 3 *Kerr* 223.

**23**———After a review of all the cases—*Held*, That where two circuits or sittings have passed after issue joined, at either of which the plaintiff might have tried the cause, the defendant may move for judgment as in case of a non-suit for not proceeding to trial according to the practice of the Court. *Oliver v. Campbell*, *Hil. T.* 1871.

**24—Limit of time for motion—Term's notice.**

There is no limit of time for a defendant to move for judgment as in case of a non-suit; nor is a term's notice necessary where four terms have elapsed without any proceedings. *Scoullar v. Payson*, *Trin. T.* 1833.

**25—Entry of cause.**

Judgment as in case of a non-suit cannot be signed unless the cause has been duly entered by the plaintiff in the Clerk's office. *Miller v. Weldon*, 1 *Han.* 376. *See Entry of Cause. Oulton v. Milner.*

**26—Motion—Entry.**

A motion for judgment absolute as in case of a non-suit, for not proceeding to trial pursuant to a peremptory undertaking, should not be entered on the motion paper; and if this course be adopted, the costs occasioned thereby will not be allowed. *O'Regan v. Robinson*, 3 Kerr 224.

**27—Particulars being demanded.**

After notice of trial given, the defendant's attorney demanded the particulars of the plaintiff's claim. None were given, and the plaintiff taking no further steps, a motion for judgment as in case of a non-suit for not proceeding to trial was refused. The demand of particulars being a complete stay of proceedings by Act of Assembly. *O'Brien v. Tate*, 2 Pug. 4.

**28**——Fourteen days' notice of motion must be given and cause entered on motion paper. *James v. McLeod*, 2 P. & B. 300. Costs on Motion. See Costs V.

## II.

## ANSWERS—EXCUSE.

**1—Sufficiency.**

An affidavit of the plaintiff, stating that the record was withdrawn at the trial "because he was advised by counsel that the testimony of one W. B. was material and necessary, and that the said W. B. now resides in Boston in the United States, and the plaintiff hopes to be able to procure his testimony at the next circuit. Held, A sufficient excuse on the first default. *Liesmond v. Yeomans*, 3 Kerr 71.

**2**——The absence of material documentary evidence, which belonged to a person who was willing to produce it, but could not then procure it in time for trial, is a sufficient excuse in opposing a rule for judgment as in case of a non-suit. *Doe dem. Scott v. King*, 3 Kerr 72.

**3**——The evidence of a material witness in a distant part of the Province, who was unable to attend without serious loss and inconvenience, greatly disproportioned to

the amount in controversy, is a sufficient excuse for the plaintiff not taking his cause to trial at the first assizes. *Scovil v. Eaton*, 3 Kerr 73.

4—The affidavit, in answer to a motion for judgment as in case of a non-suit, stated that the case arose out of circumstances similar to those existing in a case of W. against the defendant in this suit, tried at the same assizes, and the plaintiff withdrew the record in consequence of the Judge who tried the cause having decided the question of law against W. A motion for a new trial in that case having been refused, and the facts shewing that the plaintiff in this case could not recover, the rule for judgment as in case of a non-suit was granted. *White v. McDonald*, 3 Kerr 220.

5—In answer to a motion for judgment as in case of a non-suit, the affidavit of the plaintiff's attorney stated that a commission had been issued to examine witnesses on the part of the plaintiff, at W. in the United States; that one of the plaintiffs residing at W. had written to the other plaintiff residing in this Province, that the commission had been received, and would be executed; in consequence of which he gave notice of trial, but was obliged to countermand the same, the commission not having been returned; that the plaintiff residing at W. had since written to the other plaintiff, assigning as a reason for not executing the commission, his necessary absence on pressing business, and the residence of one of the required witnesses at a distance from the place where the commissioners resided; and stating that the commission should be executed and returned. *Held*, A sufficient excuse. *Doe dem. McTavish v. Rouletin*, 3 Kerr 221.

6—It is a sufficient excuse for not proceeding to trial, that the defendant has since the commencement of the action taken the benefit of the Insolvent Debtors' Act; and in such case, a motion for judgment as in case of a non-suit will be dismissed with costs, unless the defendant consents to a *stet processus*. *Ketchum v. Murray*, 2 All. 94.



7———The absence of a material witness from the Province during the sitting of the Court, is a sufficient answer to a motion for judgment as in case of non-suit upon the first default. *Kirk v. Payne*, 1 Kerr 525.

8———It is a sufficient answer to an application for judgment as in case of a non-suit in an action of trespass *qu. cl. fregit*, that the plaintiff's attorney had by mistake laid the venue in the wrong county—the plaintiff offering a peremptory undertaking and paying costs. *Peters v. Drawer*, 3 All. 432.

9———Where plaintiff, after notice of trial, was induced by the defendant to agree to refer the cause to arbitration, a motion for judgment, as in case of a non-suit, was refused with costs. *McDonald v. McIntyre*, Ber. 280.

10———Where a cause was entered for trial, and withdrawn on an agreement to refer, which the defendant afterwards refused to carry out, an application for judgment as in case of a non-suit was refused with costs. *Hanson v. Gore*, 5 All. 433.

#### 11—Insufficiency.

Judgment as in case of a nonsuit, for not proceeding to trial pursuant to notice, will be granted, although the plaintiff became bankrupt, and an assignee appointed. *Hammond v. Wheeler*, 2 Kerr 569.

An affidavit for the plaintiff's attorney that the reason for not proceeding to trial after notice was that the plaintiff resided in a distant part of the Province and did not appear nor send his witnesses, is not a sufficient answer to a motion for judgment as in case of a non-suit, there being nothing to shew why the plaintiff was not ready or that he intended to proceed in the cause. *Katham v. Hawkes*, 1 Kerr 525.

12———Where the cause had been at issue, and noticed for trial more than three years, and the only excuses offered for the delay were a hope that had been entertained of avoiding the expense of a commission by getting the cause referred to arbitration, but which was finally refused—an

intention to apply for a commission, and a belief that the cause would be ready for trial at the next circuit. *Held*, Insufficient to discharge a rule for judgment as in case of non-suit on a peremptory undertaking. *Fletcher v. Hip-pesley*, 3 Kerr 299.

13———An affidavit of the plaintiff's attorney, stating that he sent the *nisi prius* record to the circuit for entry, but when he arrived there discovered it had not been received, without stating when or how it was sent, is not sufficient to discharge, on a peremptory undertaking, a rule for judgment as in case of a non-suit, for not proceeding to trial at such circuit pursuant to notice. *Kinnear v. Watts*, 3 Kerr 440.

14———An affidavit stating that the deponent was informed and believed that the defendant had run to the United States without leaving any property in this country, is no answer to a motion for judgment as in case of a non-suit. *McGarrigle v. Smith*, 1 All. 509.

15———Where the plaintiff did not try his cause in 1849, in consequence of the absence of a witness, it is no excuse for not going to trial at the circuit in the following year; that during the summer of 1849 the defendant expressed a wish to the plaintiff's attorney to settle the suit amicably—the plaintiff not appearing to have assented thereto, and not stating any intention to go to trial. *Wetmore v. Wood*, 1 All. 703.

16———It is no answer to a motion for judgment as in case of a non-suit, that the plaintiff instructed his attorney to send his subpoenas for his witnesses, after the opening of Court at which the cause was entered for trial, and that in consequence of not receiving the subpoenas, he was unable to get the necessary witnesses. *Curran v. Gilmour*, 2 All. 87.

If a sufficient excuse is offered, it is admissible in a *qui tam* action as well as in any other; but in judging of the excuse, the Court will not altogether lose sight of the nature of the action. *Ibid*.

**17**———Notice of trial was given for the circuit in 1850, and countermanded in consequence of discovering that a material witness was in England; notice of trial was given for the circuit in 1851, but the cause was not tried, a commission which had issued to examine the witness in England not having been returned. It was not stated that the commission had issued in time to be returned before the circuit. *Held*, That the defendant was entitled to judgment as in case of a non-suit. *Ritchie v. Porter*, 2 *All.* 360.

**18**———It is no excuse for not proceeding to trial according to notice, that the plaintiff's attorney was so much engaged in the House of Assembly as to be unable to attend the trial, and that the counsel spoken to on the previous day to try the cause, was occupied in another Court—it not appearing that the counsel was prevented attending by any unforeseen cause, or that no other sufficient counsel could be procured. *Estabrooks v. Tapley*, 2 *All.* 454.

**19**———An affidavit stating that the reason for not going to trial was the absence of a witness who resided in Calais; without alleging that he was a material witness, or that any effort had been made to procure his attendance or his evidence, is not a sufficient answer to a motion for judgment as in case of a non-suit. *Nicholson v. Marks*, 3 *All.* 21.

**20**———Service of a rule to discontinue, without payment of the costs, will not prevent the defendant from obtaining judgment as in case of a non-suit. *White v. Barton*, 1 *Han.* 1.

**21**———An affidavit of the plaintiff's attorney, stating the absence of a material witness, and his belief that the testimony of the witness could be procured at the next circuit, is not sufficient to oppose a rule for judgment as in case of a non-suit for not going to trial pursuant to notice, without stating the grounds of his belief, or shewing that anything had been done to procure the attendance of the witness; but time was allowed to obtain further affidavits. *Mitchell v. Cuppage*, *Ber.* 277.

## III.

DISCHARGING RULE ON PEREMPTORY UNDERTAKING—ANSWERS  
ENLARGING RULE.

1———An application for judgment as in case of a non-suit for not proceeding to trial pursuant to notice, is sufficiently answered by shewing that the plaintiff was ready and desirous to proceed to trial, but was prevented from doing so by the defendant's attorney objecting to the insufficiency of the notice of trial. And in making such application, if it appear that the default really was for not proceeding to trial according to the practice of the Court, the motion will not succeed. *McDonald v. Ryder*, 3 *Kerr* 218.

A mistake in reference to an almanac in giving the notice of trial, which was defective, the plaintiff being ready at the Court with counsel and witnesses to try the cause, and the refusal of the defendant's attorney to waive the objection to the notice, is a sufficient excuse on a first default for enlarging a rule, on a peremptory undertaking. *Ibid.*

2———Where in an action against the Sheriff, the plaintiff's attorney issued the *venire* to a Coroner who was connected with the plaintiff (but of which the attorney was ignorant) in consequence of which the defendant challenged the array and the cause was not tried; the Court discharged a rule for judgment as in case of a non-suit, on the plaintiff's giving a peremptory undertaking and paying costs. *Stiles v. Gilbert*, 3 *All.* 262.

3———It is a sufficient answer to an application for judgment as in case of a non-suit in an action of trespass *qu cl. fregit*, that the plaintiff's attorney had by mistake laid the venue in the wrong county—the plaintiff offering a peremptory undertaking and paying costs. *Peters v. Drawer*, 3 *All.* 492.

4———Issue was joined in 1854, and by the consent of defendant's attorney the cause was not tried during the following year: no further proceedings have been taken, the Court, in Hilary Term 1858, dismissed a motion for

judgment as in case of a non-suit, on the plaintiff's giving a peremptory undertaking to try the cause—it appearing that he had a good cause of action, and the defendant not stating any defence. *Doe v. Sentill*, 4 All. 58.

5—Where two defendants had appeared and pleaded by separate attorneys in two suits brought by the same plaintiff, and notice of trial had been given in one suit for the Sittings after Hilary term 1859, but it was not tried, in consequence of one of the defendants having compromised the suits, the Court refused a rule for judgment as in case of a non-suit on application of the other defendant, on the plaintiff entering a *stet processus* and defraying the costs of the application in both cases, and the costs of the day in the suit in which notice of trial had been given. *Rankin v. Anderson*, 4 All. 635.

6—It is sufficient ground for enlarging a peremptory undertaking, that the plaintiff, who claimed under a will, was unable to discover the residence of the subscribing witness. *Connell v. Haley*, 4 All. 636.

7—Where the plaintiff countermanded notice of trial twice, first, because the presiding Judge at the Court was incapable from interest from trying the cause, and secondly, in consequence of the absence of the plaintiff's counsel from the country, a rule for judgment as in case of a non-suit was discharged on a peremptory undertaking. *Shepherd v. Hallett*, 1 Han. 43.

8—In answer to an application for judgment as in case of a non-suit, where the cause had not been tried in consequence of a challenge to the array, the plaintiff's attorney stated, that he did not issue a *venire* to the Coroner, in consequence of a statement of the defendant's attorney, leading him to believe that there was no relationship between the Sheriff and the defendant, the Court ordered the application to stand over, in order that the defendant's attorney might answer the affidavit. *Hoyt v. Stockton*, 1 Han. 329.

9—An affidavit stating the temporary mental derangement of a witness, and his subsequent recovery, is

sufficient to discharge a rule for judgment as in case of a non-suit, upon giving a peremptory undertaking and paying costs. *Samuel v. Saunders*, Ber. 278.

**10**———An affidavit of the plaintiff stating that he left the country on important business expecting to return in time for the trial, but was unable to do so, is not a sufficient answer to a motion for judgment, as in case of a non-suit. The affidavit should state all the circumstances which prevented the plaintiff's return, in order that the Court might judge whether his conclusion of inability to return was justified. *Desbrisay v. Livingston*, 5 All. 240.

**11**———There is a distinction between cases where the record is withdrawn in consequence of the absence of the plaintiff, and where it is caused by the absence of a third party. *Ibid.*

**12**———An action of Dower, under the Act 21 Vic. cap. 25, was not tried, because the defendant's counsel objected, and the Judge thought it could not be tried by the common jury, nor until an order for a view had been made, as directed by the Act: a motion for judgment, as in case of a non-suit, was refused without costs. *Doe dem. McCullough v. Dowd*, 3 All. 381.

**13—Peremptory undertaking.**

A peremptory undertaking will not be discharged on an affidavit stating that the defendant had left the Province, and had stated that he did not intend to return. *Leslie v. Rae*, Ber. 32.

**14**———A peremptory undertaking will not be enlarged merely on the ground that when the cause was called on for trial, a witness who resided in town, was not in Court, and therefore the record was withdrawn. *Doe dem Kinnear Wiswell*, Bert. 127.

**15**———The Court will enlarge a peremptory undertaking to go to trial, where suspicion attaches on the defendant that he has been instrumental in keeping material witnesses out of the way of being served with subpoena. *Robertson v. Crandall*, 1 Kerr 56.

16——Where the defendant had given notice of trial by proviso, and had afterwards countermanded it when it was too late for the plaintiff to give notice; the Court enlarged a peremptory undertaking, the plaintiff appearing to have been misled by the defendant's notice. *Gilbert v. Gordon*, 2 Kerr 374.

17——A peremptory undertaking will not be enlarged unless the plaintiff shew that he has used all reasonable and ordinary means to fulfil it. *McDonald v. Thompson*, 2 Kerr 700.

18——Affidavit of the plaintiff's attorney stated that he did not go to trial at the Court at W. because he understood that an objection had been sustained to the legality of the jury by the Court at Saint John, in consequence of the Sheriff not having filed a list of persons qualified to serve as jurors; and knowing that the Sheriff of W. had not filed any list, he expected a similar objection would be taken by the defendant. *Held*, A sufficient ground for enlarging a peremptory undertaking. *Sidell v. Best*, 3 Kerr 640.

The plaintiff being in contempt for non-payment of the costs incurred by his first default, it was made a condition of enlarging the rule that those costs, the costs of the day on the second default, and the costs of the motion, should be paid within a month. *Sidell v. Best*, 3 Kerr 640.

19——A rule absolute for not proceeding to trial according to peremptory undertaking, cannot be moved for until the term succeeding the sittings in which plaintiff undertook to bring on the cause, notwithstanding time has gone by for giving notice of trial. The plaintiff may move for enlarging the undertaking during the term. The condition is not broken until time for trial is past. *Groves v. Sisson*, 1 Kerr 102.

20——A peremptory undertaking will not be enlarged on the ground that the plaintiff's counsel advised on the first day of the Circuit, that the declaration must be amended—in consequence of which, the cause was not tried. *Marshall v. Winslow*, Mich T. 1838.

## V.

**JUDGMENT BY DEFAULT.**

*See* Interlocutory Judgment—Practice X.

**1—Signing of—Plea treated as a nullity.**

In a summary action on a promissory note, the defendant pleaded as to part, that the plaintiff had sustained damage by the non-performance of the promises to the amount of £7 9s. which he confessed and was ready to pay; and as to the residue non-assumpsit. The plaintiff treated the plea as a nullity, and signed judgment. *Held*, That the judgment was regular, it not being shewn that the plea was filed in time. *Sayre v. Smith*, 2 *All.* 164.

*Quære*, Whether such a plea was good in a summary action? But if pleaded in time, it should not have been treated as a nullity. *Ibid.*

*Semble*, That being accompanied by a notice of set-off, the plaintiff could not have signed judgment for the sum confessed. *Ibid.*

**2—Setting aside—Costs.**

In Hilary term an interlocutory judgment was set aside on payment of costs, and on terms of the defendant paying £7 9s. into Court within ten days after taxing costs, and if defendant would not accede to these terms, the motion to be dismissed without costs. The rule entered by the clerk of the Court and served on the defendant was unconditional, "that the motion be dismissed without costs." The defendant afterwards paid part of the amount, and agreed to pay the defendant the balance in two months. The defendant afterwards discovered that the rule had been improperly entered, and in Trinity term applied to set aside the judgment. The Court considering that the defendant's attorney might have ascertained the decision of the Court, refused the application. *Sayre v. Smith*, 2 *All.* 363.

**3—For want of plea—Pleas and notice of defence.**

Judgment by default for want of a plea cannot be signed after the plea is filed and a copy delivered to the plaintiff's attorney, though the filing and delivery were after the time for pleading had expired. *Oulton v. Palmer*, 2 *All.* 364.



If two pleas are pleaded, and a notice of other matters of defence given under the Act. 18 Vic. cap. 32, the plaintiff is not justified in treating them as a nullity; but should apply to a Judge to set them aside. *Ibid.*

The actual signature of counsel is not necessary to the copy of plea delivered. *Ibid.*

#### **4—Signing too Soon.**

By the Act. 12 Vic. cap. 40, a defendant in a summary action has thirty days to plead from the last day of the term exclusively, though the writ may have been returnable on the first day of the term; therefore where the term ended on the 20th October, judgment by default signed on the 19th November, was too soon. *Glass v. Corrigan*, 3 All. 295.

#### **5—Summary Costs.**

The defendant allowed judgment by default to be signed against him for a sum above £20, though the amount due plaintiff was under that sum; the Court refused, after final judgment signed, to stay the proceedings on payment of the sum due, and summary costs. *Collins v. McCarthy*, 3 All. 504.

#### **6—Setting aside after execution of writ of inquiry.**

A judgment by default in an action of *tort*, set aside on payment of costs after the execution of a writ of inquiry, on an affidavit of merits, and that the omission to appear was through ignorance and mistake—no trial having been lost. *Burrell v. James*, 3 All. 599.

#### **7—Effect as evidence.**

In an action of covenant on a deed purporting to have been executed at Birmingham, judgment by default admits the deed as declared on, and no proof of it is necessary on an inquiry of damages. *Hasluck v. McMaster*, Mich. T. 1825.

#### **8—Judgment by default—Assessment—Affidavit.**

In assessing damages under the act after judgment by default, the plaintiff must establish the amount of his debt or damages by legal proof. Where the only evidence of

the debt was an account shewing several sums of money due from the defendant to the plaintiff on various transactions, with an affidavit of the plaintiff, that "the account was just and true;" it was held insufficient, and the judgment was set aside. *See Practice VI. 50.*

**9—Judgment by default in Magistrate's Court.**

The defendant, O'Donnell, obtained judgment by default against the plaintiff in a justice's court on an account for "Sundries." The judgment was signed without an affidavit of the debt, and an execution was issued under which the plaintiff's cow was seized and sold—an action of trespass being brought. *Held*, The judgment and execution no justification, as judgment not signed in accordance with statutory requirements and particulars insufficiently described as "Sundries." *Jackson v. O'Donnell, 2 Pug. 60.*

**10—Admission of Contract—Evidence.**

Where a special contract is set out in the declaration, and the plaintiff obtains judgment by default on demurrer, the contract is admitted as stated in the declaration, and evidence which would have been admissible under the general issue, will not be received on an inquiry to assess the damages. *McDonald v. Cumming, 2 Pug. 282.*

**Justice's Court.**

A Justice of the Peace has no power to sign a judgment by default unless plaintiff or agent appears. *See Supra Judgment I. Wright v. Parlee.*

**Fraud charged against an Insolvent.**

Court will not pronounce judgment on the fraud where judgment by default against insolvent. . *See Insolvent Act. Moss v. Kirkpatrick.*

**Judgment by default in ejectment—Setting aside—Merits.**

*See Ejectment IV. 4.*

**Summary action—Filing plea before appearance—Letting defendant in to defend.**

*See Andrews v. Hanson, 1 All. 509.*

**What not a waiver of irregularity in signing.**

*See Practice VII. 11, 12.*

**JUDGMENT (INTERLOCUTORY).**

*See* Judgment by Default.

**Motions and Applications to set aside.**

*See* Practice V. 80, 81.

**Setting aside of.**

*See* Practice VI. 15, 16, 17, 18.

**Regularity or Irregularity of.**

*See* Practice VII. 10, 11, 12.

**Revival of—Scire facias.**

*See* Practice X. 2.

**Non-resident—Necessity of obtaining judge's order to proceed in cause.**

*See* Practice VI. 49.

**JUDGMENT NUNC PRO TUNC.****Making up new record.**

*See* Judgment.

**JUDGMENT NON OBSTANTE VEREDICTO****Covenant—Immaterial Plea.**

*See* Covenant 12.

**Replevin—Pleading.**

*See* Pleading II. 29.

**JUDGMENT OF NON PROS.**

*See* Practice VI. 8-12.

**JUDGMENT ROLL.**

*See* Amendment III—Judgment.

**JUDGMENT (RULE FOR).**

*See* Practice VIII.

**JURAT.**

*See* Affidavit V.

**JURISDICTION.**

*See* Bastardy—Justice of the Peace—Courts—Criminal Law—Writ of Error—Foreign Judgment—Fredericton (City of)—Replevin—Costs I. 26—British N. A. Act.

**JURORS.****Affidavits, of.**

*See* New Trial II. 41. Affidavit IV.

**Conduct of.**

*See* New Trial II. III.

**Fees as witness—Right to recover.**

*See* Costs II. 37.

**JURY****Questions for—On trial.**

*See* Evidence XII.

**1—Summoning of—Highway.**

Where the proceedings of Commissioners in altering a road under the Act 5 Wm. IV. cap. 2, were objected to, whereupon the inhabitants applied to two Justices to obtain a warrant for a jury. *Held*, That it was not necessary that the jury should be summoned from another parish. *Reg. v. Commissioners of Highways for Parish of Johnston*, 3 Kerr 583.

**2—Venire.**

A *venire* to summon twelve jurors to try a cause is correct, but as the number stated is not for the officer's guide in summoning, he should summon twenty-four. *Hazen v. Bryson*, 2 All. 580.

*Quere*, Whether thirty jurors ought not to be summoned under the Act 13 Vic. cap. 43. *Ibid*.

(*See* Venire.)

**3—Qualification of.**

A person named in the Act of Incorporation and in the list of subscribers, who never authorized his name to be used or held any shares in the Company, ceases to be a member thereof after the first meeting to organize the Company, and is therefore not disqualified as a juror, in an action brought by them. *Portland Ferry Company v. Pratt*, 2 All. 17.

**4—Challenge of.**

It is not a ground of challenge to the array, that some of the jurors named in the Sheriff's panel are not on the list of persons qualified to serve as jurors, filed under the Act 18 Vic. cap. 24. *Dow and Wife v. Dibblee*, 1 Han. 55.

(*See* Criminal Law.)

5———It is no ground of challenge to the array, that the action is based upon a lease made by the Mayor, etc., of St. John to the lessor of the plaintiff; that the Mayor, etc., had, or claimed to have, a reversionary interest in the land in dispute; and that the Sheriff who summoned the jury, and the jurors, were Corporators of St. John—it not being alleged that the Corporation of St. John had any interest in the suit. *Doe dem. Grant v. Boyne*, 1 *Han.* 431.

It is no ground of challenge to a juror in an action brought by a Corporation, that he is in the employ of one of the stockholders in the Company. *Frederickton Boom Co. v. Macpherson*, 2 *Han.* 8.

6———Where the Sheriff and Coroner had married sisters, it is a good ground of challenge to the array, that the jury have been returned by the Coroner in a cause where the Sheriff is defendant; and the death of the wife of the latter without issue does not destroy the affinity. *Oulton v. Morse*, 2 *Kerr* 77.

The objection, however, not having been taken by the defendant until the cause was called on for trial, at a late day of the Court, the costs of the day for not proceeding to trial pursuant to notice were refused. *Ibid.*

7———It is no principal cause of challenge to the array, that the Sheriff by whom the jury were returned was married to a sister of the person who was security for the costs, and who had aided the plaintiff with money to carry on the suit; but the Court would in such case, on application by the defendant, award the *venire* to the Coroner. *Murchison v. Marsh*, 2 *Kerr* 608.

8———The defendant may challenge the array if affinity exists between the Sheriff who summoned the jury and himself. *Wetmore v. Levi*, 5 *All.* 180.

#### 9—Illness of—Trial—Waiver.

If one of the jury is taken ill during a trial, the Judge cannot, without consent of the parties, swear another juror in his place, and continue the trial. The objection is not waived by the defendant's counsel afterwards addressing the jury. *Noble v. Billings*, 3 *All.* 85.

**10—Disqualification.**

The fact of a man being in the employment of a stockholder of an Incorporated Company, does not disqualify him from serving as a special jurymen in the trial of a case to which the Company is a party. *Frederickton Boom Co. v. McPherson*, 2 Han. 8.

A challenge for cause to a special jurymen must be supported by affidavits. (Per Weldon, J. at *Nisi Prius*.)

**11—Summoning of Jury—Venire—Time of service—Availability of objection.**

In this case the jury were summoned by a Coroner, the plaintiff's attorney issued the *venire*, but only placed it in the officer's hands two or three days before the opening of the Court. Sixteen jurors attended and a jury was struck from them. Defendant's counsel challenged the array on the ground that by the Act the jury should be summoned at least six days before they are required to appear. The challenge was overruled, and plaintiff having had a verdict, a rule *nisi* for a new trial was thereupon obtained. *Held*, (per Weldon and Duff, J. J.) that defendant was entitled as a matter of right to a *venire de novo*; but, (per Fisher and Wetmore, J. J.) that as no injustice had been done by the verdict, and the Court had the power to refuse a new trial in the exercise of its discretion the rule should be discharged. *N. B. R. Railway Co. v. Murray*, 2 P. & B. 48.

**12—Jurymen under age—Insufficient affidavit—Delay.**

Where a party to suit in a Justice's Court after the expiration of thirty days obtained a rule *nisi* for a *certiorari* to remove the judgment on an affidavit, simply stating that he was informed and believed one of the jurymen was under age, the rule was held improperly granted and was discharged. *Regina v. Perley*, 2 Pug. 449.

**13—County Court—Sheriff's Jury under writ de prop. prob.—Number.**

In replevin in the County Court, seven is the proper number of jurymen under a writ *de proprietale probanda*. *Gregory v. McQuade*, 3 Pug. 1. See now Consol. Stat. cap. 45, sec. 15.

**14—Jury—Elisors summoning—Impartiality.**

It is not a sufficient objection to elisors named to summon the jury in an action against the Sheriff for a false return to a writ of election that one of them had voted for the plaintiff at the election, and that the other had always been opposed to the defendant and to the returned candidate. *Stiles v. Gilbert*, 3 All. 508.

**Affidavits of.**

See Affidavit IV—New Trial I. II. 41.

**Misconduct of Juror—Objection when should be taken.**

See New Trial III. 51. *Olive v. Belyea*.

**Relationship and affinity of Juror.**

See New Trial III. 36. *Bishop v. Goff*.

New Trial IV. 5. *Tuck v. Harding*.

**Treating Jurors.**

See New Trial II. 44. *Ferguson v. Troop*.

**Receiving refreshment.**

See New Trial II. 30. *McNeil v. Moore*.

**Jurors lodging with plaintiff.**

See New Trial III. 46. *Spence v. Trenholm*.

**Conversing with jurors by defendant.**

See New Trial II. 29. *Trefethen v. Carman*.

**Fees as witness—Right to recover.**

See Costs II. 46. *Murray v. Williston*.

**Finding of Jury as to property in replevin.**

See Replevin 36. *Gibson v. McKean*.

**Special Jury—Talesmen.**

Talesmen may be sworn on special jury. See *Rankin v. Godard*, 4 All. 155.

**Striking Panel—Abandonment of rule.**

See Practice VII. 1.

**Jury of view—Neither party should be present at the view.**

*Bennett v. Smith*, 1 P. & B. 27.

**Shewer and plaintiff—Improper conduct.**

*See* New Trial II. 43. *Bennett v. Smith.*

**Jury of view in actions of Dower.**

*See* Dower.

**Jury separating after Judge's charge.**

*See* New Trial III. 45. *Lymburn v. Deveber.*

**Questions on trial proper for consideration of Jury.**

*See* Evidence XII.

**Panel—Summoning—Relationship of Sheriff.**

*See* Criminal Law. *Regina v. Moleaux.*

**Demurrer of challenge—Withdrawal of.**

*Ibid.*

**JUSTICE OF THE PEACE.**

I. COURTS.

II. JURISDICTION IN CIVIL CASES AND REVIEW.

III. DUTIES—LIABILITY—PROTECTION.

IV. SUMMARY CONVICTIONS AND OTHER PROCEEDINGS.

A. Jurisdiction.

B. Information.

C. Proceedings for Penalties.

V. CONVICTIONS.

VI. GENERALLY.

VII. COSTS.

VIII. NOTICE OF ACTION.

*See* Criminal Law—Bastardy.

I.

COURTS.

1 ———Courts of Justices of the Peace established by the Act 4 Wm. IV., cap. 45, are not Courts of Record. *Young v. Woodcock*, 3 Kerr 554.

2 ———A limited power given to a Court to fine and imprison does not constitute it a Court of Record. *Ibid.*

**Power of Justices to commit for contempt—Acting Judicially are Courts of Record.**

*See* Contempt.



## II.

## JURISDICTION IN CIVIL CAUSES.

**1—Civil Cause—Trespass to land—Title in question.**

A Justice of the Peace has no jurisdiction to try an action of trespass to land under the Act 4 Wm. IV., cap. 45, where the defendant claims an interest in, or a right to the use of the land; as where the question was whether there was a public highway over the land. *Sloan v. Davis*, 2 All. 598.

2 ——— A Justice of the Peace has no jurisdiction under the Act 56 Geo. III., cap. 17, to try an action where the title to land comes in question, and if the defendant in an action of trespass justifies entering on the land, as being a highway, the jurisdiction of the Justice is ousted. *Colwell v. Purdy*, Trin. T. 1831.

2 a ——— If in an action of trespass to land, tried before a Justice of the Peace, the defendant sets up title and offers a deed in evidence, and the plaintiff also gives evidence of deeds, and of a title arising by estoppel, on which the Justice undertakes to decide; the title is *bona fide* in question, and the Justice has no jurisdiction. *Regina v. Harshman*, 1 Pug. 346.

**3—Seamen's wages.**

By the Act of Parliament 7 and 8 Vic. cap. 112, sec. 15, in all cases of wages not exceeding £20 which shall be due and payable to any seamen, it shall be lawful for any Justice of the Peace in and for any part of her Majesty's Dominion where, or near to the place where the ship shall have ended her voyage, &c., to make an order for payment of the wages. *Held*, 1. That any Justice in the county where the voyage ended, had jurisdiction. 2. That if there had been a deviation from the voyage agreed upon, or the ship was unseaworthy, the seamen had a right to determine the contract, and to recover wages to the time of leaving the ship. 3. That the jurisdiction of Justices under sec. 15 extended to all cases where wages were due and payable, and not merely to the case specified in sec.

11. 4. That the order of the Justice need not fix any time for the payment of the wages. *Regina v. Wheaten*, 3 *All.* 269.

**4—Money demand—Review from Justice's Court.**

Where the particulars of the plaintiff's demand in a Magistrate's Court, were 3d. over £5, though the amount stated in the summons was for £5, and the demand proved, which had not been reduced by actual payment, was less than £5, and the verdict for 2s. 9d. *Held*, That the magistrate had no jurisdiction. *Draper v. Munroe*, 3 *Kerr* 438.

**5—Waiving Balance.**

A Justice of the Peace has no jurisdiction under the Act 4 Wm. IV., cap. 45, in cases of debt where the amount exceeds £5, unless reduced to that sum by actual payments. A creditor has not the power of bringing such a debt within the jurisdiction of a Justice, by waiving the balance of his claim so as to bring the demand within the sum to which the Justices' Courts are limited. *White v. Macklin*, 1 *Kerr* 94.

See Revised Statutes (Justice's Act) allowing abandonment.

6—An objection, that a defendant was a commissioner for laying out public money, and as such contracted with the plaintiff, and is not therefore personally liable, cannot be set up upon review of the Justices' judgment, where it was not made at the trial before the Justices. The proceedings in Magistrates' Courts are regulated by the same general rule as in other Courts. *Cormier v. Tibideau*, 1 *Kerr* 299.

7—In the case of a review from a Justice's Court, it is not a sufficient ground for reversing the judgment that the evidence to support the verdict is slight and contradicted by that on the other side, if the whole case be such as the Justice was warranted in submitting to the jury for their decision. *Lee v. Breen*, 2 *Kerr* 323.

8—On review from a Justice's Court, the defendant against whom judgment had been rendered did not deny

his liability, but contended that he was jointly liable with another person, and that although the action had been commenced against both, judgment had been rendered against him alone. It appearing on the Justice's return that he was the only defendant who had been served with summons and appeared, and that the judgment had been so entered at his request; the Court affirmed the judgment. The Court refused to receive affidavits to falsify the return. *Buckstaff v. Doten*, 2 Kerr 866.

9————On review of the judgment illegally rendered for a defendant in a Justice's Court, the same may not only be reversed, but judgment will be awarded for the plaintiff for the amount sought to be recovered, where the right is clear and the facts undisputed. *Watson v. Marks*, 2 Kerr 694.

10————The Court is very reluctant to disturb a Justice's judgment on a strict rule of law, where the substantial justice of the case is in favour of the verdict. *Jordan v. Coates*, 2 All. 107.

#### 11—Replevin.

A Justice of the Peace may grant replevin for cattle impounded, for breach of regulations of Justices in Sessions made under the Act 13 Vic. cap. 30, it being in the nature of a distress damage feasant. See *Sterling v. Jones*, 2 All. 522.

12————A Justice has jurisdiction, though the value of the cattle impounded exceeds £5, if the amount required to obtain their release does not exceed that sum. *Ibid.*

#### 13—Granting new trial.

A Justice of the Peace has no power to grant a new trial in an action tried before him under the Act 50 Geo. III, cap. 17. *Rose v. Marsh*, Trin. T. 1827.

#### 14—Proceeding with trial—Different Justice.

Where a Justice of the Peace commences the trial of a civil suit, but is unable to proceed because he is required as a witness, and another Justice is called upon to try the cause under 1 Rev. Stat. cap. 137, sec. 28, he must con-

tinue the proceedings to the end of the suit, the first Justice has no further jurisdiction. *Sumner v. McMonagle*, 6 *All.* 203.

**15—Commission.**

A new Commission of the Peace, in which the name of one of the former Justice is omitted, does not determine his authority until he has express or implied notice of the new Commission. *Turner v. Doyle*, *Trin. T.* 1833.

**16—Nearest Justice—Meaning.**

An Act directed that the damages caused by an alteration of a road, should be assessed by five freeholders, to be appointed by "the nearest Justice of the Peace." *Held*, That this necessarily meant the nearest disinterested Justice. *Rex v. Heavyside Hil. T.* 1833.

**17—No jurisdiction—Issuing execution—Liability.**

The judgment of an Inferior Court, involving a question of jurisdiction, is not conclusive; therefore, a Justice of the Peace is liable in an action of trespass for issuing an execution on a judgment recovered before him, in a case in which he had no jurisdiction because the title to land came in question, though the judgment remains unreversed. *See Pickett v. Perkins*, 1 *Han.* 131.

**Issuing execution—Regular if in Statutory form.**

*See Execution IV, 9.*

**Proceedings for breaking into field under lawful fence.**

*See Trespass II. 2.*

**18—Parish Court—Jurisdiction must appear on face of proceedings—Residence of plaintiff or defendant—Place.**

In an action in a parish Civil Court, it should appear on the face of the proceedings, either by evidence or by the admission of the parties, that the case is within the limits of the Commissioner's jurisdiction. And in an application for review where it did not appear from the proceedings that the plaintiff or defendant resided or the cause of action arose within the Parish for which the Commissioner was

appointed, it was held by Allen, C. J., and Weldon and Duff, J. J., that the judgment should be set aside, and also that the facts necessary to give jurisdiction could not be shewn by affidavit: Wetmore, J., dissenting. *Corbett McCracken*, 2 P. & B. 157.

**19—Review — Point not raised at trial—Substantial Justice done.**

Where the Court can see that substantial Justice has been done in the proceedings before the Justice, the decision will not be reversed on a ground which the parties themselves did not raise at the trial. *Regina v. Archibald*, 2 P. & B. 250.

**As to sufficiency of general objection taken at the trial.**

See *Kennedy v. Turnbull*, 2 Pug. 378.

**Judgment by default—Signing of—No party appearing for plaintiff.**

See Judgment I. 8, *Wright v. Parlee*.

**No proper proof of account nor particulars served.**

See Judgment V. 9.

**Cases of contract.**

See *Infra VII. Rideout v. Stevens*.—Review.

### III.

#### DUTIES—LIABILITY—PROTECTION.

**1—Paying over money.**

A Justice of the Peace, to whom money is paid on a judgment recovered before him, is bound to pay it over to the plaintiff in the suit, and if he does so, and the judgment is afterwards reversed on appeal, he is not liable to repay the defendant, though he promised to retain the money till the appeal was decided. *Wilson v. Boyd*, 2 All. 537.

*Quære*, Whether a justice is entitled to a notice of action for money had and received in such a case. *Ibid*.

**2—Refusing to proceed in cause.**

Where a magistrate commenced the examination of a party on a criminal charge, and after hearing a portion

of the evidence refused to proceed with it further, the Court refused to grant a mandamus at the instance of a private prosecutor to compel him to do so. *The Queen v. Duvaney*, 1 Han. 511.

**3—Liability of—Trespass—Issuing execution.**

A Justice of the Peace is not liable to an action of trespass for issuing a second execution for a balance due upon a judgment recovered under the Act 4, Wm. IV., cap. 45, before the first execution is returned—the matter being within the justice's jurisdiction. *Stewart v. Hazen* 2 All. 254.

Such an execution may be irregular, but is not void. *Ibid.*

**4—Defective conviction—Prior acts.**

Where a Justice of the Peace has jurisdiction to try a complaint, and there has been a regular information, but the conviction and warrant of commitment are defective, he is not liable in trespass for anything done prior to the conviction. See *Sevel v. Olive*, 4 All. 394.

**5—Receipt of money by justice—Liability.**

Defendant, a Justice of the Peace, acting without jurisdiction, issued a warrant for the arrest of the female plaintiff, but when the parties were brought before the justice, he recommended them to settle the matter, and she paid an amount to the constable and was discharged. Held, That the receipt by the justice of the part of the amount as his fees, was not such a recognition of the settlement as to render him liable for the sum paid. *Gidney and wife v. Debble*, 5 Pug. 388.

6—When a justice, on receiving notice of action, makes a tender which is not paid into court, and the jury find the tender sufficient, the plaintiff is not entitled to have a verdict entered for the amount tendered. *Ibid.*

**7—Protection of justices—Irregularity in proceedings.**

Plaintiff, having been convicted before defendants, two Justices of the Peace, of selling spirituous liquors without license, was fined a certain sum, to be levied by distress,

and if not paid within a limited time, plaintiff to be imprisoned. At the expiration of the time limited for payment, defendants issued a warrant of commitment, without previous issue of distress warrant. *Held*, in an action for false imprisonment, That as plaintiff was guilty of the offence of which she was convicted, and her imprisonment did not exceed that assigned by law to the offence, defendants were entitled to the protection of section 11 of the Rev. Stat. cap. 129, and to have the verdict reduced to two pence. *Smith v. Simmons*, 2 *Pug.* 203. See also *Trespass V. 3. Armstrong v. McCaffrey*.

**8—False imprisonment—Committing Clerk of Peace for refusing to produce records.**

A Clerk of the Peace is not bound to produce the records of the sessions in his possession as such clerk, in compliance with a *subpœna duces tecum*, and where a Clerk of the Peace was imprisoned for refusing to produce such records when so required, it was *Held*, That the justice was liable to an action for false imprisonment.

It was proper for the plaintiff, on the trial of the action, to shew that while he was imprisoned, he had been requested to perform certain judicial duties as Judge of Probates, and had been prevented from complying with such request by reason of his imprisonment. *Wetmore v. Harding*, 2 *P. & B.* 338.

**9—Compelling performance of official acts.**

In case a Justice of the Peace refuses to perform an official act, the Court, or a Judge thereof, may by rule or order compel him to perform it. The issuing of a *capias* is an official act, within the meaning of chap. 90, sec. 5, of the Consol. Stat. *Waterbury v. Nixon*, 2 *P. & B.* 373.

**10—Compelling Justice of Peace to perform a judicial act.**

The power given to the Supreme Court by the Rev. Stat. cap. 129, sec. 5, (Consol. Stat. cap. 90,) to compel a Justice of the Peace to perform an official act, does not

apply to the proceedings before justices in civil suits under cap. 137 of Rev. Stat., (Consol. Stat. cap. 60.) *Bustin v. Ellis*, 6 *All.* 231.

*See* Trespass V. 2, 10.

**Criminal information against.**

*See* Criminal Information.

IV.

SUMMARY CONVICTIONS, AND OTHER PROCEEDINGS.

A. JURISDICTION—LIABILITY.

1 ———— If, in a prosecution before a Justice of the Peace, under the Highway Act 5 Wm.IV., cap. 2, the title to land comes in question, it must be gone into by the Justice if he entertain the suit. *Regina v. Buchanan*, 3 *Kerr* 674.

2—**Proceedings taken in Foreign country.**

A Magistrate has no jurisdiction to administer an oath and take examination within the limits of a Foreign country, and a commitment founded on such proceedings is void, and affords no justification in an action of trespass against the Magistrate. *Nary v. Owen*, *Ber.* 377.

3—**Adjourning proceedings—Power.**

One Justice of the Peace has power at the return day of the summons to adjourn the proceedings till a future day, under the Summary Conviction Act, (1 Rev. Stat. cap. 138, sec. 21) though jurisdiction to hear the case is given to two Justices. *Ex parte Holder*, 6 *All.* 338.

4—**Same Justices—Trial.**

*Quere*, Whether a complaint, under the Act 15 Vic. cap. 51, should be tried by the same Justices who issued the summons. To be available, this objection should be taken at the trial. *See Ex parte Cole*, 3 *All.* 48.

5—**One Justice issuing summons—Penalty before two.**

One Justice may issue the summons on a complaint under the Act 33 Vic. cap. 23, though the penalty is recoverable before two Justices. *Reg. v. Simmons* 1 *Pug.* 158.



**6—Interest—Disqualification.**

If the Justice is interested in the prosecution, as where he was a member of a Division of the Sons of Temperance, by which a prosecution for selling liquor was carried on, he is incompetent to try the cause, and a conviction before him is bad. *Ibid.*

**7—Two parties acting—Authority to one.**

An authority given to one Justice to recover penalties may be exercised by two. *Ex parte Dunlop*, 3 All. 281.

**8—Summons—Warrant—Authority.**

Complaint under oath of an assault was made before a Justice, on which he issued a summons: the defendant not appearing, the Justice, on proof of service of the summons, issued the warrant (B) under the Summary Convictions Act of Canada, 32 and 33 Vic., cap. 81, upon which the defendant was arrested, brought before the Justice and convicted,—protesting against the proceedings. *Held*, That as there was a complaint under oath, the Justice had authority to issue a warrant in the first instance, and that having used the form (B) instead of (C) did not make the arrest illegal, and that he had power to convict, though the summons served was defective in not stating the day the defendant was to appear. *Reg. v. Perkins*, Trin. T. 1872.

**9—Omission of Words.**

Where the law directs the application of a penalty, it is no objection to a conviction for such penalty, that it omits the words, "to be paid and applied according to law," given in the forms of conviction under the Summary Conviction Act. *Ibid.*

**10—Place—No objection—Conviction.**

Where the jurisdiction of the Justices appeared upon the conviction, which was in form prescribed by 1 Rev. Stat. cap. 138, and the place of sale spoken of at the trial appeared to be known by all parties, and no objection was then made that it was not within the jurisdiction of the Justices. *Held*, That the jurisdiction sufficiently appeared. *Ex parte Dunlop*, 3 All. 281.

**11—Injuring fence.**

The offence of wilfully injuring a fence under cap. 158 1 Rev. Stat. is not punishable by summary conviction. *Ex parte Mulheron*, 4 All. 259.

**12—Joint acting—Lunatic—Apprehension of.**

Before two justices can issue a warrant for the apprehension of a person charged with being a dangerous lunatic under the 1 Rev. Stat. cap. 89, (Consol. Stat. cap. 22), the evidence required by the statute must be given before them, both acting together, and it is not sufficient that an affidavit be made before one and shewn to the other. *McGuirk v. Richard*, 2 Pug. 240.

**13—Trespass—Want of Jurisdiction—Reasonable and probable cause—Costs against justices.**

The defendant, a Justice of the peace, issued a warrant to arrest the female plaintiff on an information stating that she did "unlawfully take and carry away from his (the informant's) protection, her daughter S. W." The Justice preferred to act under the Dominion Statutes 32 and 33 Vic. cap 20, sec. 56. *Held*, in an action for assault and false imprisonment, that the defendant had no jurisdiction to issue a warrant on this information, and was liable to an action of trespass, and that the question of reasonable and probable cause can only arise where the Justice has jurisdiction over the matter. *Stiles v. Brewster*. (4 All. 414 discussed.)

*Quere*, Whether the Dominion Act 32 and 33 Vic. cap. 29. sec. 134, relating to costs in actions against Justices is not *ultra vires* the Federal Parliament. *Whittier and wife v. Dibble*, 2 Pug. 243.

**14—Commitment to other place than common gaol—Verbal order—Trespass.**

Plaintiff was convicted before two of the defendants' Justices of the peace for King's County, of "selling liquor without licence," and ordered to pay twenty dollars and costs, otherwise a distress warrant to issue, and in default of good, to be imprisoned in the common gaol at Kingston, King's County, for 50 days, unless the penalty and costs,

together with costs of distress and commitment and of conveying plaintiff to gaol, should be sooner paid. At this time an act had been passed to provide for the removal of the Shiretown from Kingston to Hampton, and, in the meantime, making the gaols of St. John and Westmorland, the common gaol of King's, the officer executing any process having the option of taking the prisoner either to St. John or Westmorland. The constable not being able to find any goods to levy on, the justices issued a warrant of commitment, directing the plaintiff to be taken to Kingston and there imprisoned for 50 days, unless the penalty and costs (including costs of distress-warrant and of conveying plaintiff to gaol) be sooner paid. The Justices verbally directed the constable to take plaintiff to St. John, and the fees were made up for taking him there. Plaintiff was only confined a few days, when he was discharged by Judge's order. *Held*, In an action brought against the Justices and constable for false imprisonment :

1. That the warrant of commitment was illegal, both as to amount and place of imprisonment, and that the Justices had no authority, verbally, to direct the constable to take the plaintiff to St. John.

2. That, in section 11 of the 1 Rev. Stat. cap. 129, the word "or" should be read "and," and that the provisions of the section did not apply in this case so as to protect the Justices.

*Quære*, Whether an offence is sufficiently stated in a conviction for selling "liquor" without license. *Campbell v. Flewelling et al.*, 2 *Pug.* 403.

#### **15—Trespass to lands—Bona fide dispute.**

Where, in a proceeding before two Justices under 1 Rev. Stat. cap. 183, for willfully cutting and carrying away timber off complainant's land, there is shewn to be a *bona fide* question of title or boundaries, and the act was done under a *bona fide* claim of right, the wilfulness of the act is negatived, and defendant should be discharged. *Ex parte Donovan*, 2 *Pug.* 389.

*B. INFORMATION—CONVICTION—PROOF.*

**16—Variance.**

A variance between the information and the evidence in summary proceedings before Justices of the Peace is not fatal, since the Summary Conviction Act, 1 Rev. Stat. cap. 138; therefore, on an information for selling various kinds of spirituous liquors, a conviction for selling brandy only is sufficient. *Ex parte Parks*, 3 All. 287.

**17** ——— It is no ground for quashing a conviction for selling spirituous liquor without license that the information on which it is founded, and the warrant issued thereon, state the offence to be, selling "liquor" without license; or, selling contrary to the Acts of Assembly, when there is but one Act to regulate the sale; or, selling to divers persons unknown to the informant—provided the evidence proves a sale to a particular individual, and no objection was taken by the defendant at the trial to the variance between the information and proof, and it does not appear that he was in any way misled by it. *Reg. v. Harshman*, 1 Pug. 317.

**18** ——— On an information for selling spirituous liquors without license contrary to the by-laws of the Town of Moncton, the illegal sale was proved, but there was no evidence of the by-laws, and the Justices convicted the defendant of selling contrary to the Statute to regulate the sale of spirituous liquors (17 Vic. cap. 15). *Held*, That as it did not appear that the defendant was misled, or had any defence on the merits, the variance between the information and the conviction was not fatal since the Rev. Stat. cap. 138, sec. 1. *Ex parte, Dunlop* 3 All. 281.

**19** ——— A warrant to search for liquors in a dwelling house in which a family resides, and no part of which is used as a shop or place for the sale of liquors cannot issue under the Act 18 Vict. cap. 36, without the oath of three persons stating their reasons for believing that liquors have been sold, or are kept in such dwelling house for illegal sale. *Reg. v. Salter*, 3 All. 321.

Proof that the house in which the liquor was seized was kept as an hotel, will not justify a search-warrant on the information of one person as it cannot be judicially noticed that an hotel is a place for sale of liquor. *Ibid*

Where liquor legally imported is condemned under section 15, as being kept for illegal sale, the Justice has no power to order the casks containing the liquor to be destroyed. *Ibid*.

The *onus* of proving that the liquor was not intended for sale in order to save it from forfeiture under section 15, is thrown on the owner ; but to subject him to the penalty under section 16, it must be proved that he intended the liquor for illegal sale. *Ibid*.

An information under the Act need not state that the informer is a reputable person. *Ibid*.

#### **20—Right of party to know informer.**

In a proceeding under Act 18 Vic. cap. 36, sec. 15, the person summoned to shew why the liquors seized should not be forfeited has a right before going into his proof to be informed who the complainant is, and what he has sworn to in the information. *Ex parte Stevenson*, 3 All. 391.

#### **20a—No complaint on oath—Party appearing.**

Where power is given by an Act to a Justice of the Peace to issue a summons upon complaint made on oath, and the party to be summoned up appears and defends the suit without any summons being issued, he cannot afterwards object that there was no complaint on oath—this being only a preliminary step to authorize the summons to issue. *Ex parte Wood*, 1 All. 422.

#### **21—Information—Liquor Act—Search Warrant**

A warrant cannot issue under the Act 18, Vic. 36, to search liquors in a dwelling-house, in which a family resides, without the information of three persons, though there may be a shop or place in the house for the sale of liquors. An information stating that intoxicating liquors are kept for illegal sale by A. "in his house or shop or on the premises where he now dwells, in the County of C.," is not

sufficiently certain to authorize the search of a dwelling-house under the said Act. Such an information will not justify a search warrant, stating that there was a place in the dwelling-house for the sale of liquors. *Ex parte Caldwell*, 3 *All.* 393,

**22—Information not under oath—Curing defect.**

In a case for selling liquors without license the information was not under oath. The defendant's counsel appeared however on the day of trial, and though he raised this objection he did not ask a delay or adjournment, and cross examined the witnesses. The defendant was convicted on clear proof of the offence, and it did not appear that she had been in any way misled or prejudiced by the alleged defect in the information. *Held*, Under these circumstances that the 1 *Rev. Stat. C.* 138. (*Con. Stat. Cap. c.* 62). cured the defect. *Regina v. McMillan*, 2 *Pug.* 110.

**23—Administering oath.**

In an action for slander for stating that the plaintiff had sworn falsely, it appeared that the proceedings in which the alleged false swearing was done, were before two justices, on an information for unlawfully killing cattle. *Held*, That this being a mere trespass, the parties had no jurisdiction to administer an oath, and that the plaintiff should be nonsuited. *Ganong v. Fawcett*, 2 *Pug.* 129.

**24—Selling liquor without licence—Statement of time—Second offence—Evidence.**

A conviction for selling liquor without licence "on a certain day between the 31st July and 1st September in same year, to wit on the 1st day of August" is sufficient, and it is not necessary to have fixed the exact day of sale. Where a party is sought to be convicted under the Act 36 *Vic. cap. 10, sec. 11*, (*Consol Stat cap.* 105) of selling liquor without license, as for a second offence, he must be charged in the information with the commission of a second offence, and it must also be proved that at the time of the information he had been previously convicted. (*Regina v. French*, distinguished). *Regina v. Justices of Queen's*, 2 *Pug.* 485.

**25—Selling liquor contrary to regulations—Conviction before one justice—Evidence.**

A regulation of the General Sessions of the City and County of St. John, made in September, 1856, required every tavern-keeper to put up, &c., over his door, a sign-board with his name at full length, and the words "Licensed Tavern" legibly painted thereon, under a penalty of forty shillings. This regulation was made under the authority of the Act 17 Vic. cap. 15, sec. 7, which directed that the penalties should be recovered before two Justices of the Peace. McG. was tried before one justice, and convicted under this regulation "for selling liquor without a sign-board." The conviction did not shew that McG. was a licensed tavern-keeper. *Held*, That the conviction was bad for two reasons. (1.) Because one justice had no jurisdiction to try the offence; and (2.) because the conviction did not state that McG. was a licensed tavern-keeper, to whom only the regulations applied. *McGilvery v. Gault*, 1 P. & B. 641.

**26—Summary Conviction for assault—Praying to proceed summarily—Service of copy of minute of conviction—Justification to constable arresting—Distinction between order and conviction.**

A Justice of the Peace has no jurisdiction to try an assault summarily, unless it is given him by Statute, and he must strictly pursue the authority given, and in order to give him jurisdiction under the Statute of Canada, 32 and 33 Vic. cap. 20, sec. 43, it is necessary that the complainant should request him to proceed summarily, and this request should be made at the time of the complaint. Where the proceedings did not shew whether such request was made or not, but it was proved that the complainant was present at the return of the summons, and gave evidence against the defendant, if any intendment could be made, it might be presumed complainant had made such request. If a warrant of commitment issued by a Justice of the Peace is good on its face, and the magistrate had jurisdiction in the case, it is a justification to a constable to whom it is given to be executed, and a person resisting

him, is guilty of an assault ; and where the warrant was based on a conviction for an unlawful assault, it is not necessary, in order to make the warrant legal and a justification to the constable, that it should be stated in the conviction and warrant that the complainant had requested the magistrate to proceed summarily. *Quere*, Whether it is necessary to state in the warrant and conviction that the complainant had requested the magistrate to proceed summarily. Where the form given by the schedule of the Act has been pursued, and the offence is one over which the magistrate had jurisdiction, if requested to proceed, and he has proceeded and convicted on the evidence, and in the presence of the prosecutor, the Court was inclined to sustain the conviction and warrant. The warrant reciting the conviction, and being good on its face, under such circumstances, was a sufficient justification to the constable. A conviction for an unlawful assault may adjudge defendant to be imprisoned in the first instance, under sec. 43 of the 32 and 33 Vic. cap. 20. It is not necessary, before a defendant, convicted of an assault, is imprisoned, that he should be served with a copy of the minute of conviction. The 52nd section of the Act 32 and 33 Vic. cap. 31, which might require this to be done before a warrant of commitment could issue, applies to *orders* made by justices, and not to *convictions*. A party duly convicted of an offence, is bound to take notice of the terms of the conviction at his peril. *Regina v. O'Leary*, 3 *Pug.* 264.

### C. PROCEEDINGS FOR PENALTIES.

#### **27—Summons—Service—Selling liquor.**

A proceeding for a penalty under the Act 15 Vic. cap. 51 for selling intoxicating liquors is not a civil suit within the Justice's Act 4 Wm. IV., requiring six days service of summons. *Semble*, Such an objection to the summons would be cured by the appearance of the defendant. *Ex parte Coll*, 3 *All.* 48.

#### **8—Action of debt—Cumulative remedy.**

The action of debt given by Act 15 Vic. cap. 51, is a cumu-



lative remedy, and does not take away the mode of proceeding prescribed by the Summary Convictions Act 12 Vic. cap. 81. *Ex parte Hartt*, 3 *All.* 122.

**29—Recovery before Mayor.**

The penalties imposed by the Act 3 Vic. cap. 47, for selling liquor without license, are recoverable before the Mayor of Fredericton, under the Act of Incorporation 14 Vic. cap. 15, sec. 67. *Reg v. Allen*, 2 *All.* 435.

The Mayor being *ex officio* a Justice of the Peace, may in that character proceed for penalties which by the city charter are made recoverable before the Mayor. *Ibid.*

**30—**Under the charter of the City of St. John, the fine imposed upon persons carrying on trade within the city, without having been admitted as freemen, is properly recoverable before the Mayor, although the warrant must be under the seal of the city. *Reg. v. Small*, 2 *Kerr* 48.

**31—Selling liquor without license—Town of Woodstock—Recovery under Act—Prosecutor.**

A penalty for selling liquor without license in the town of Woodstock, is recoverable under the Act 17 Vic. cap. 15, which regulates the sale of spirituous liquors, and not by the provisions of the Act incorporating the town of Woodstock.

Where no other mode is provided a prosecution to recover a penalty may be in the name of the Queen.

The common law mode of proceeding for penalties is not taken away by 1 Rev. Stat. cap. 161, sec. 32. *Regina v. Armstrong*, 6 *All.* 81.

**32—Solemnising marriage.**

The fine imposed by Rev. Stat. cap. 146, sec. 3 for knowingly solemnising a marriage where either party is under twenty-one years of age without consent of father, may be recovered before two Justices of the Peace under Rev. Stat. cap. 161, sec. 32.

The proceedings need not be in the name of the Queen. *Regina v. Gallant*, 5 *All.* 115.

V.

CONVICTIONS.

**1—Selling liquor—No day specified.**

A conviction for selling spirituous liquor without license is bad, if it does not specify the day on which the offence was committed. (But *see* 23 Vic. cap. 33.) *The Queen v. French*, 2 Kerr 121.

**2—Exceptions.**

In a conviction under the Act 15 Vic. cap. 51, which prohibits the sale of intoxicating liquors, except beer, ale, porter and cider, it is insufficient to allege that the sale was "contrary to the Act of Assembly." The conviction should negative the exceptions in the Act. *Ex parte Clifford*, 3 All. 16.

**3—Persons selling—License—Onus probandi.**

In a prosecution for a penalty for selling liquor without license, proof that the sale was made by a person in the defendant's shop in his absence, and without shewing any general or special employment of such person by the defendant in the sale of liquors, is sufficient *prima facie* evidence against him. *Ex parte Parks*, 3 All. 237.

The prosecutor need not prove that the defendant had no license. *Ibid.*

The penalty is incurred by the sale of any of the kinds of liquor mentioned in the Act 17 Vic. cap. 15. *Ibid.*

**4—Form.**

A conviction under the Prohibitory Liquor Act 18 Vic. cap. 36, must follow the form prescribed in the schedule of the Act, and not the form in the Summary Conviction Act. *Ex parte Breeze*, 3 All. 395.

The form of conviction given, stated that in default of payment of the fine and costs of prosecution, the defendant should be imprisoned for three months "unless the said several sums be sooner paid." *Held*, That a conviction under the Act, which in addition to those sums, required the costs of distress and commitment to be paid, was bad. *Ibid.*

### **5—Admission of sale — Different Justice — Pleading recovery.**

A prosecution for selling liquor without license was instituted before A., a Justice of the Peace who, on the return of the summons, adjourned the trial. The defendant then went before another Justice, and admitted the sale, whereupon such Justice imposed a fine upon him. At the adjourned hearing before A., the defendant pleaded this conviction in bar, but A., notwithstanding, proceeded with the case, and convicted the defendant. *Held*, That his conviction was good. *Reg. v. Roberts*, 5 All. 231.

### **6—Highways.**

A conviction for obstructing a highway is bad, unless it appear on the face of it that the place was a public highway. *Reg. v. Brittain*, 2 Kerr 614.

**7**——— Dedication of a road to the public may be presumed from long user and the expenditure of statute labour on the road, and a party may be convicted under the Stat. 5 Wm. IV., cap. 2, sec. 16, for encroaching upon such a road, as well as upon highways duly laid out and recorded. *Reg. v. Buchanan*, 3 Kerr 674.

### **8—Owner of land not punishable for not removing fence—Duty of Commissioner to do so.**

*See Highway 15.*

### **9—Greater penalty than prescribed by Act.**

When an Act of Legislature prescribes a definite penalty for an offence, the imposition of a penalty other than the one prescribed is irregular, and the conviction will be set aside. *Ex parte Wilson*, 1 P. & B. 274.

### **10—Justice adjudging commitment—Penalty and Costs—Costs of commitment.**

A conviction under the Act 33 Vic. cap. 23, for selling liquor without license is bad, if in addition to costs of prosecution allowed by the Act, the parties adjudge the defendant in default of payment, to be committed to goal for a certain time, unless the penalty and costs, *together with the costs of commitment and conveying him to goal, be sooner paid*. *Regina v. Harshman*, 1 Pug. 317.

**41—Conviction under Statute 32 and 33 Vic. cap. 20, sec. 43—Dominion Statute Assault.**

Where the conviction awards the costs of conveying the party to goal not authorised by the Statute, the Judge on hearing of appeal has power to amend the conviction, and to rectify the mistake of the Justice convicting, and to strike out that part which relates to the cost of conveying the party to gaol. The Amended Section 65, shall be read in connection with Section 68, and the conviction as amended to be enforced. Opinions of Judges on case submitted October 1878.

**Selling meat without licence—Conviction under By-Law, St. John.**

*See By-Law 7. Ex parte Minnehan.*

**By-Law St. John—Punishment by imprisonment for breach of.**

*See By-Law 8. Ex parte Trask.*

VI.

GENERALLY.

**1—Void for Uncertainty.**

Where the information in a conviction charged the defendant with measuring or surveying lumber intended for exportation in violation of the Act of Assembly 8 Vic. cap. 81, and the evidence referred to three distinct Acts, but it did not appear for which of them the defendant had been convicted. *Held*, That the conviction was bad for uncertainty. *Held* also, That the Court had no power to allow costs on the quashing of a conviction. *Regina v. Stevens*, 8 *Kerr* 356.

2 ——— A conviction adjudging the defendant to be imprisoned for twenty days or pay £5 and costs, is bad. *Reg. v. Wortman*, 4 *All.* 73.

3 ——— A conviction under [the 1 Rev. Stat. cap. 133, sec. 3, for fraudulently taking away lumber, describing it as "the property of another," is defective; it should state the name of the owner. *Ex parte Holder*, 6 *All* 338.

**4—Amending—Improperly including costs.**

Where costs had been improperly included in a conviction for breach of by-law of City of Fredericton, the amount was deducted, and the conviction sustained for the penalty. *Ex parte Mowry*, 3 *All.* 276.

5 ————A conviction for a penalty, whereby defendant was ordered to pay the fine "forthwith within thirty days," is sufficient under Rev. Stat. cap. 138, Form L. *Reg. v. McGowan*, 6 *All.* 64.

**6 Adjudging commitment—Application of forms—Certainty.**

A conviction under the Act 33 Vic. cap. 33, for selling liquor without license, is bad, if in addition to the costs of prosecution allowed by the Act, the Justices adjudge the defendant in default of payment to be committed to gaol for a certain time unless the penalty and costs, *together with the costs of commitment and conveying him to gaol*, be sooner paid. *Reg. v. Harshman*, *East T.* 1873.

The form of conviction (L.) in 1 Rev. Stat. cap. 138 specifying the costs of commitment and conveying the defendant to gaol is not applicable to all cases, but only where the Act under which the penalty is imposed, authorizes the Justices to award such costs. *Ibid.*

A conviction for selling liquor without license, stated the sale to have been contrary to the Acts of Assembly (stating the titles of the Acts). *Held*, That it was sufficiently certain, and that the conviction was substantially good under both Acts, the first, (17 Vic. cap. 15,) making the sale of liquor without license illegal, and the second, (38 Vic. cap. 32,) imposing the penalty for such sale. *Ibid.*

**7—Exceeding power—Gaol—Imprisonment.**

The Act 34 Vic. cap. 12, enacted, That during the erection of a new gaol for King's County, the Sheriff of the County was authorised to imprison any person arrested by him, in either of the gaols of the counties of St. John or Westmoreland, as such Sheriff should think fit. *Held*, That a conviction which adjudged a person to be imprisoned in the

common gaol of King's County, at Kingston, was bad—the option of the place of imprisonment being in the Sheriff by the Act. *Reg. v. Perkins, Trin. T. 1872.*

**8—Enlarging Rule for quashing conviction—Application—Excuse for non-service.**

A rule *nisi* for quashing a conviction was granted in Easter Term, returnable at the next term. The rule was not served upon the prosecutor or justice, until the day preceding Trinity Term. The Court refused to enlarge the rule,—no satisfactory reason being stated for the delay.

*Reg. v. Harshman, Trin. T. 1868.*

**Alien—Liability for tax.**

*See Alien.*

**Indented Apprentice—Infant—Conviction.**

*See Apprentice.*

**Removal of proceedings.**

*See Certiorari.*

Order of Justices to condemn liquor with packages, etc., is indivisible and if bad in part is bad in toto. *See Ex parte Breeze, 3 All. 390.*

VII.

COSTS.

**1**——Costs cannot be given on a conviction for a penalty for breach of a by-law of the City of Fredericton. The word “costs” in the 81st section means the costs of distress and sale *Ex parte Mowry, 3 All. 276.*

**2**——Costs not allowed on quashing conviction. *See Reg. v. Stevens, 3 Kerr 356.*

**3**——Justices' Summary Conviction Act 12 Vic. cap. 31, gives no general powers to award costs on convictions. *Ex parte Clifford, 3 All. 16.*

**4**——Where Justices have power to award costs on a summary conviction, they must specify the amount. *Ex parte Hartt, 3 All. 122.*

**5**——If the prosecutor appears at the trial of a complaint, and the Justice, after hearing, dismisses it, he has no

power to award costs against the prosecutor under the Summary Conviction Act, 1 Rev. Stat. cap. 138, sec. 11. (But see Form P.) *Ex parte Beattie*, 5 All. 377.

**6—Costs—Power to award—Information dismissed.**

A justice of the peace has power to grant costs on dismissing an information heard before him under the Summary Conviction Act, (Consol Stat. cap. 62, sec. 16). (*Ex parte Beattie Mich. T.* 1863, overruled). *Ex parte Ross*, 2 P. & B. 337.

VIII.

NOTICE OF ACTION.

*See* Action at Law (Notice of Action).

*Quere*, As to notice of action where money not paid over. *See* Supra *Wilson v. Boyd*, III. 1.

**JUS TERTII.**

*See* Carrier 3—Trover 20.

**JUSTIFICATION.**

**Proof of—On cross-examination of plaintiff's witness.**

*See* Evidence VIII. 6.

**Privilege of House of Assembly.**

*See* Arrest.

**Defamation—General Issue.**

*See* Defamation.

**Matter not allowed under general issue.**

*See* Evidence XIII.

**Justifying under third party.**

*See* Trespass II. 5, 6, 11.

**Under process.**

*See* Execution IV. 4—Justice of Peace IV. 26—Evidence III. 25.

Acts which would have been waste, if done by the tenant, cannot be justified by any person acting under his authority. *See* Landlord and tenant VII. 3.

**Admissibility of evidence under general issue—Objection not made in time.**

*See* Evidence XI. 23.

**Breaking and entering close—Defendant acting as servant of constable—General issue answering whole declaration.**

*See* Pleading II. 40.

**Fences—Defect of—Trespass.**

In trespass by cattle, if the defendant justify the entry of the cattle through defect of fences, it must be specially pleaded. *Gurwold v. Hallet, Mich. T. 1834.*

### LACHES.

**Neglect to present draft.**

*See* Evidence XII. *Dunn v. Fredericton Boom Co.*

### LAKE.

*See* Crown Grant I. 19.

### LAND DAMAGES.

*See* Assessment—Damages—Mandamus.

## LANDLORD AND TENANT.

*See* Distress.

I. LEASES—AGREEMENTS—CONSTRUCTION—OPERATION.

II. TENANCY—NOTICE TO QUIT.

III. RENT.

IV. RIGHTS OF LANDLORD.

V. DEFENCE BY TENANT.

VI. LEASES.

VII. MISCELLANEOUS.

VIII. SUMMARY EJECTMENT.

### I.

LEASES—AGREEMENT—CONSTRUCTION AND OPERATION.

**1—Grant of reversion—Tenancy determined.**

M. being in possession of premises as tenant from year to year to W., a lease of the same under seal was made by W. to J. for ninety-nine years from the date. *Held*, That such lease took effect as a grant of the reversion for that term, and entitled J. to put an end to M.'s tenancy by a proper notice to quit. *Doe dem. Jarvis v. McCarthy*, 3 Kerr 63.



**2—Refusal to take possession—Liability for rent.**

The plaintiff agreed to let a shop to the defendant in the same state that the tenant then in possession had it; the tenant on quitting removed some gas fittings which formed part of the shop, in consequence of which the defendant refused to take possession. *Held*, That he was not liable for the rent. *Dunn v. Howard*, 1 *All.* 615.

**3—Agreement for new lease—Conditional.**

The lessee of a building lease containing a covenant by the landlord to pay for improvements, being indebted to the landlord at the end of the term, surrendered all his interest in the lease, in order to secure the debt, and the landlord released the arrears of rent and agreed to renew the lease on payment of the debt within a year. *Held*, on a bill filed for specific performance of this agreement after the expiration of the year, That it was a conditional agreement for a new lease, and not a mortgage. *Purris v. Hume*, 3 *All.* 299.

**3 a—Agreement to lease—Condition for purchase.**

Defendant agreed to lease ungranted land from the plaintiffs, the rent to be paid on the 1st October, and if before that day she should agree to purchase the plaintiffs' interest in the land, the rent to form part of the purchase money; but if she should determine not to purchase, and notify the plaintiffs thereof, the payment of rent was to be postponed till the 1st April, when the lease was to terminate. The defendant gave no notice of intention not to purchase, but continued to pay rent for two years after the 1st April. *Held*, That the agreement was not absolute, and that the defendant was not liable in an action for refusing to purchase, nor for land bargained and sold. *McCallmont v. Mulhall*, 4 *All.* 200.

After the termination of the plaintiffs' lease, the defendant leased the land from the Crown with the plaintiffs' consent. *Held*, That the relation of landlord and tenant having ceased, the defendant was liable to the plaintiffs for use and occupation. *Ibid.*

**4—Ferry—Season—Termination.**

The owner of a ferry leased it to the defendant in May "for the season of 1855." *Held*, That this was not a lease for a year, but that it terminated either at the closing of the river by ice, or on the 31st December, 1855. *Fraser v. Drynan*, 4 *All.* 74.

**5—Agreement—Easement.**

An agreement for the use of driving power of an engine is only an easement which cannot be created by parol, and a parol agreement would be determined by a conveyance to a third person from the party agreeing to give the powers. *Brewing v. Beryman*, 2 *Pug.* 115.

**6—Parol lease for three years from future date—Mortgagor in possession—Payment of rent to—Tenant at will to mortgagee.**

A verbal agreement to lease premises for three years from a future date is void under the Statute of Frauds, and although by entry and payment of rent to the mortgagor in possession, the party would become a tenant from year to year as to him, he would be nothing more than a tenant at will to the mortgagee or a person claiming through him. *Ibid.*

**7—Holding over by tenant.**

A contract for a new tenancy for a year cannot be implied from the mere fact of the tenant holding over, no act being done from which an agreement for a new tenancy can be inferred. *Leighton v. Vanwart*, 1 *P. & B.* 489.

**Plaintiff managing farm—Tenancy.**

*See* No. 8.

**Surrender of lease What amounts to.**

*See* Covenant 9.

## II.

## TENANCY—NOTICE TO QUIT.

**s**——Where A. went into possession of premises as tenant to B., and had occupied for several years, without any terms of holding being agreed upon, and never paid any rent, but built a barn and made other improvements

on the premises, and on being applied to for payment of rent after B.'s death, stated that his improvements were worth more than the rent. *Held*, That it enured as a tenancy from year to year, and that the tenant could not be ejected without a notice to quit. *Doe dem. Macqueen v. Hunter*, 1 Kerr 518.

**9—Agreement to hold on new terms—Evidence.**

Plaintiff, in the occupation of property as tenant from year to year of the defendant and two others, who owned the property in equal shares as tenants in common, on being applied to by the defendant shortly before the expiration of his year, stated that he wished to continue in possession another year; defendant then gave him notice that he should expect £100 per annum, for his share of the property, to which the plaintiff made no objection, but continued in possession. Defendant afterwards distrained for a quarter's rent. *Held*, That there was sufficient evidence for a jury to infer that the plaintiff had agreed to hold as tenant to the defendant upon the new terms. *Sturdee v. Merritt*, 3 Kerr 641.

**10—Sufficiency of Tenancy—Working Farm.**

A person working a farm on the shares and occupying part of the house jointly with the owner of the farm, has not such a tenancy as to prevent the owner from maintaining trespass to the land. *West v. Stherton*, 2 All. 653.

**11—Working Farm—Possession—Tenancy.**

In trespass for taking hay and grain, it was proved that the land on which they grew belonged to the plaintiff's father, who four years before the trial, gave it up to the plaintiff on condition that he should support his father and family; that the father continued to live on the land, but that the plaintiff took the management of the farm and sowed the grain and cut the grass. *Held*, That the jury were properly directed that this constituted a tenancy and gave the plaintiff the possession of the crops. *Ferguson v. Savoy*, 4 All. 263.

**12—Tenancy yearly—Admission—Letter.**

The plaintiff leased land to A. for two years, from the

1st May, 1848, with an agreement to renew the lease or pay for the improvements. A. assigned to B., who remained in possession till August 1851, and then assigned to the defendant, subject to the payment of the rent due. Before taking the assignment, the defendant wrote to the plaintiff, enquiring about his title to the land, and whether he (defendant) would be safe in paying the rent to B. The plaintiff answered, that he thought he had a right to look to the defendant for the rent; to which the defendant replied, admitting his liability for the rent, and that the plaintiff was the owner of the land. *Held*, That the letter admitted a tenancy from year to year, at the rent reserved in the lease to A., and that it was properly left to the jury to find whether such a tenancy existed. *Doe v. Pelletier*, 4 *All.* 93.

**13—Agreement—Letting into possession under.**

An agreement was made between A. and B. in 1824, by which A. agreed to convey land to B. on payment of a certain sum of money on or before the 1st May 1829, together with the interest on the purchase money for the first three years, and eight per cent. for the last two years, as a consideration for the use of the land. B. was let into the possession under the agreement. *Held*, That this agreement created a tenancy for years, expiring on the 1st May 1829, and not a mere tenancy at will. *Doe dem. Cliff v. Connaway*, *Ber.* 382.

**14—Agreement to purchase not fulfilled—Tenancy.**

A. became tenant from year to year to B., at a certain rent in 1858. In 1860, A. agreed to purchase the land, and gave his note for the price, taking a bond for a deed from B. on payment of the note. The agreement to purchase was never carried out, no payment having been made by A., and by consent of the parties the agreement was destroyed, and A. remained in possession without any new agreement. *Held*, That the tenancy was not determined by the agreement to purchase, and that B. could distrain for the subsequent rent. Also, that whether the tenancy continued or not was a question of law. *Croskill v. Wortman*, 5 *All.* 648.

**15—Holding over—Notice to quit—Ejectment.**

Where a tenant, under a parol lease for seven years, holds over after the expiration of the term, no notice to quit is necessary, before bringing an action of ejectment against him. *Doe dem. Parkinson v. Haubtman*, Ber. 484.

## III.

## RENT.

**16—Payment—Mode—Custom.**

In replevin, the defendant proved an occupation by the plaintiff at annual rent from 1st May, and also by several witnesses, that rent was generally paid quarterly, and that on a general letting they thought the custom was to pay quarterly. *Held* (Chipman, C. J., *dubitante*), That the Judge was right in directing the jury to find for the plaintiff, because there was not sufficient evidence of an agreement to pay the rent quarterly. *Smith v. Miliken*, 1 All. 210.

*Quære*, If the evidence of custom was admissible. *Ibid*.

**17—Acceptance of rent—Recognition of person.**

*Quære*, Whether the acceptance of ground rent by the lessor from a person in possession, is a sufficient recognition of such person as assignee of a term. *Ansley v. Peters*, 1 All. 339.

**18—Claim by landlord—Sheriff—Execution.**

Where a landlord makes a claim for rent to be deducted out of the proceeds of an execution, under the Act 12 Vic. cap. 39, the Sheriff is entitled to a reasonable time to enquire into the demand; and where the tenant had denied that any rent was due, and the landlord refused to allow the Sheriff time to make the inquiry, the Court refused the cost of an application to compel the Sheriff to pay the rent. *Nowlin v. Anderson*, 1 All. 497.

**19—Conveyance to third party—Rent payable to — Prima facie case.**

The defendant went into possession of property under an agreement with A. for three years; before the expiration of the term, A. conveyed the property in fee to the

plaintiff, and told the defendant that the last quarter's rent must be paid to the plaintiff : the defendant paid the rent accordingly, and remained in possession after the expiration of the term, but refused to recognize the plaintiff as landlord. *Held*, in an action for use and occupation, That the plaintiff had made out a *prima facie* case, and was improperly non-suited, though the defendant had no notice of the conveyance, and though A. admitted he had no title to the land, and went there by permission of P., who was the owner. *Connell v. Hammond* 2 All, 120.

*Held* also, That such evidence of title in P. should not have been received. *Ibid*.

**20—Agreement with wife—Agency.**

De endant held land as tenant from year to year under an agreement with the plaintiff's wife and with his consent, by which agreement the rent was to be paid to the wife. *Held*, That the wife, in making the lease, must be presumed to have been acting as her husband's agent, and that the payment of rent to her would be sufficient unless her husband notified the tenant not to do so. *Doe Dem. Andres v. Taylor*, 5 All. 144.

**21—Disclaimer—What does not amount to.**

A refusal to pay rent to the plaintiff, and a denial of his right to the property, but at the same time claiming to hold it under the lease from the wife does not amount to a disclaimer. *Ibid*.

**22—Rent not due—Judge's order to pay rent.**

Before an order can be made on a Sheriff to pay rent out of the proceeds of goods sold by him under execution, and taken from leased premises, it must be shewn that the rent is actually due. *Regina v. Williston*. 2 P. B. 149.

*Quære* Whether a Judge has any authority to make such order under the attachment Act in cases of seizure and removal. *Ibid*

**Distress for rent—Assignment by tenant under Insolvent Act—Preferential lien.**

*See* Insolvent Act 87. *McLeod v. McGuirk*.

**Rent chargeable on funds bequeathed.**

See Executors, &c., 14, *Wetmore v. Ketchum*.

## IV.

## RIGHTS OF LANDLORD.

**23—Goods seized by Sheriff—Rent not due.**

When the goods of a tenant have been seized by the sheriff under a *fi. fa.*, and taken away from the demised premises before any rent became due, the landlord is not entitled to receive any part of the proceeds of such goods from the sheriff, under the Act 7 Wm. IV, cap. 14, sec. 11. *Street v. Glass*, 1 *Kerr* 165.

**24—Double Rent—Insufficient answer.**

It is no answer to an action for the recovery of double the yearly value of premises held over after notice to quit, that subsequent to the notice and while the tenant remained in possession, an agreement was made between him and the landlord to refer to arbitration a claim made by the tenant for improvements on the premises during the tenancy. *Hatheway v. McMahon*, 2 *Kerr* 209.

**25—Re-entry for non-payment of rent—Landlord's right.**

In an action of ejectment upon a right of re-entry in a lease, for non-payment of rent, brought under, 1 Rev. Stat. cap. 126, sec. 24, the affidavits shewed that the annual rent of the demised premises was £9 10s, payable half-yearly; that \$181.42 were due at the time of service of the declaration; to countervail which the whole amount of property on the premises available for distress was \$68. On motion for a rule for judgment against the casual ejector. *Held*, per Weldon, Fisher and Duff, J. J., That the landlord's right to judgment was not limited to cases where there was not enough distress to satisfy a half-year's rent; that, therefore the affidavits were sufficient, and plaintiff should have rule for judgment; but per Wetmore, J., That under the peculiar wording of Section 24 of the Revised Statutes, the landlord's right to proceed under that section was confined to cases where there was not enough distress to

satisfy a half year's rent, and that as in this case there was more than sufficient for that purpose, the rule should be refused. *Doe dem. Chipman v. Roe*, 3 *Pug.* 470.

**26 · Service of declaration on Tenant—Notice to Landlord—Whether necessary.**

Where ejectment is brought for recovery of premises which are under a demise at the time of the commencement of the action, if the landlord has notice of the service of the declaration on the tenant, and of the nature and effect of it, he is bound by the judgment recovered; but unless the landlord has such notice and understood the nature of the proceeding and the effect of it, he will not be bound by the judgment; and whether he did so understand it is a question for the jury—per Allen, C. J., and Weldon and Duff. J. J.; but, *Held*, per Wetmore, J., that notice of the proceeding in ejectment to the landlord is not necessary, the service of the declaration on the tenant being sufficient to conclude the landlord by the judgment, so as to prevent him questioning its obligation otherwise than by action of ejectment. *Upwood v. Morrissey*, 3 *Pug.* 519.

**27—Right to one year's rent—Rent not due.**

Where the rent is not due the landlord is not entitled by virtue of 1 Rev. Stat. cap. 126, sec. 8 (Consol. Stat. cap. 83, sec. 8), to be paidrent from proceeds of the sale under an execution.

*Semle*, It is doubtful if this section applies to cases of goods taken under a writ of attachment. *Ex parte Fish*, 1 *P. & B.* 273.

V.

DEFENCE BY TENANT.

**28—Third person disputing the right of Plaintiff.**

Where the defendant entered into possession as tenant to F., under a yearly rent, she cannot set up by way of defence to an action brought by the legal assignee of F. for the rent accrued subsequent to the assignment, that a third person disputes the right of the plaintiff, claiming also as assignee of F. *Ansley v. Longmire*, 2 *Kerr* 321.



A tenant cannot during his continuance of the possession dispute the title of the landlord under which he came into possession. *Ibid.*

**29—Mortgage by Landlord.**

A tenant cannot set up as a bar to the demand of his landlord for rent, that the landlord, or one under whom the landlord claimed, had previous to the demise mortgaged the premises in fee to a third person, unless the tenant has been evicted by the mortgagee, or paid the rent to the mortgagee under notice, and to avoid eviction. *Joplin v. Johnson*, 2 Kerr 541.

**30—Disputing title.**

The plaintiff being in possession of land, a grant of it was made by the Crown to the rector, church wardens, and vestry of W., of which the rector informed the plaintiff, who agreed to hold the land from the rector at an annual rent, and paid the rent two or three years. *Held*, That the plaintiff could not dispute the rector's title by shewing a previous grant of the same land to B., through whom he did not profess to claim. *Hughes v. Holmes*, 1 All. 12.

(See Estoppel I. 3, 20, 21.)

**Evidence under Mortgagee's title.**

See Ejectment II. 6.

**31—Use and occupation—Tenancy—Evidence.**

In an action for use and occupation, where it appeared that the defendant had given the plaintiff notice he would quit the plaintiff's premises at the end of the term; and after the expiration thereof the plaintiff's agent demanded the premises, which the defendant refused to give up; and at a subsequent period, before the end of the first quarter, the defendant tendered the keys to the plaintiff's agent, which he refused to receive, stating he considered the defendant tenant for another year, and liable to pay double rent; the defendant paid the first quarter's rent, after which it not appear that he was in possession. *Held*, That the circumstances were not sufficient to create or continue a tenancy after the first quarter, and the verdict for the plaintiff was set aside. *Bowman v. Avery*, 3 Kerr 206.

**32**———A tenant having given notice of his intention to quit at the end of his term, afterwards refused to give up possession, but before the expiration of the first quarter offered the keys to the landlord's agent, which he refused to receive, stating that he should hold the tenant liable for double rent; the tenant then ceased to occupy the premises, and afterwards paid the first quarter's rent, and pending an action for the next half year's rent, paid the last quarter's rent, after judgment by default. *Held*, These circumstances were not sufficient to constitute a tenancy, and that the landlord could not recover for the intermediate quarters in an action for use and occupation. *Bowman v. Avery*, 3 *Kerr* 587.

**33—Former recovery—Erection—Claim of reduction of rent.**

*See* Action at Law (Former Recovery) *Rourke v. McCullough*.

**34—Entirety of rent—Conveyance of reversion—Covenant.**

The plaintiffs leased land to the defendant for a term of years at the rent of £30, and afterwards during the term, conveyed away the reversion in part of the land. *Held*, That the rent being entire, the plaintiff could not apportion it, and maintain covenant against the lessee for non-payment. *Rector &c., of Sackville v. Bacon*, 6 *All.* 134.

**35—Sheriff.**

Reasonable time allowed for sheriff to enquire into claim of rent. *See* No. 15.

**36—Tenant of Mortgagee—Setting up title of Mortgagee.**

A tenant of a mortgagee has a right to set up the title of the latter as a defence to an action of ejectment brought by the person holding the equity of redemption. *Doe dem. Smith v. Snarr*, 1 *P. & B.* 56.

VI.

LEASES.

**1—Execution of—Possession—Avoidance—Fraud.**

To bring a lease within the exception of the Act 26 Geo.

III, cap. 8, sec. 18, it is not necessary that the execution of the lease and the possession of the land should be exactly concurrent acts. A lease from A. to C. for two years, made at a place 90 miles distant, on the 14th July, and possession taken under it on the 18th or 19th July, and continued thereafter, will not be avoided by a deed of bargain and sale to B., duly acknowledged and registered on the 3rd August; such lease to C., though made in contravention of an agreement for sale to B., will not be void on the ground of fraud, unless C. were cognizant of the agreement; and fraud will not be inferred. *Sutherland v. Walter*, 1 Kerr 141.

**2—Assignee of term—Profert—Recognition—Interest recoverable.**

A party suing as assignee of a term, on a covenant contained in the lease, and alleging and making profert of an assignment by deed is bound to prove it; and if several assignments are alleged, a traverse that the plaintiff became entitled *modo et forma*, puts the whole of them in issue. *Ansley v. Peters*, 1 All. 389.

*Quere*, Whether, if an assignment by deed had not been alleged, the acceptance of ground rent by the lessor from a person in possession, was a sufficient recognition of such person as assignee. *Ibid*.

In an action by the assignee of a lease against the lessor, on a covenant to pay for improvements according to valuation, the plaintiff is entitled to interest on the amount appraised, from the time it becomes payable. If the lessor refuse to appoint an appraiser, the jury may allow interest on the value of the improvements as part of the damages. *Ansley v. Peters*, 1 All. 389.

**3—Lease—Exclusive privilege to search, etc. for Coal—Period—Contingency.**

By an instrument under seal, A. agreed to lease to B. the exclusive right to search for, dig, and carry away coal found in and under property thereafter described; that such exclusive privilege of the right to search should extend over a period of four years from the date, in order that B.

should have ample time to complete such search. It then described the land over which the right of search extended ; and reserved to the lessor one shilling and three pence per chaldron, in the event of coal being discovered, sufficient to warrant working, and £5 per annum for the right of searching ; and it was further agreed that A. did thereby lease to B., his heirs and assigns, for ninety-nine years, such and so many acres, not to exceed four, which might be required in connection with the working of the said mines, and that such privilege should extend to and be made available in entering on the said lands for the purpose of mining, etc., in connection with such mining operations. *Held*, That the lease for ninety-nine years was contingent upon the discovery of mines ; and if none were discovered within the term of four years, the lease for ninety-nine years did not come into existence. *Caledonia Mining Company v. Blight*, 6 All. 96.

#### **4—Apportionment of persons as Valuers.**

A building lease contained the following covenant:—  
“The lessor, for himself his heirs, and assigns, doth covenant and agree to and with the said lessee his heirs and assigns, that at the expiration of this lease the buildings on the demised premises shall be valued by disinterested persons, and he will then either pay for them at such valuation or continue the lease to a further term at the same annual rent at the option of the said lessor. *Held*, that as the valuation provided for was not an arbitration but a mere appraisement—the lessor could himself appoint the valuers, as long as they were disinterested. *Gilbert v. Smith*, 2 P. & B. 211.

#### **Assignee of Lessee against Lessor—Covenants.**

*See Assignment 3.*

#### **Power of Attorney—Authority to execute leases with covenants.**

*See Power of Attorney.*

#### **Covenants—Assignee of Lessee against Lessor—Pleading.**

*See Pleading II. 25*

**Lessor's title—Actual Entry.**

*See* Ejectment I. 2.

**Covenants for new lease—Payment of Appraisement—Conditions.**

*See* Covenant 8.

**Authority to lease—Mode.**

*See* Fredericton (City of).

**Ejectment by Lessee against Lessor—Surrender by Lessee relied on—Question for jury.**

*See* Surrender.

## VII.

## MISCELLANEOUS.

**1—Landlord and Tenant Act—Review of proceedings Determination of tenancy.**

An application to review proceedings under the Landlord and Tenant Act 18 Vic. cap. 58, should be made at the first term after the trial, unless some reason is shewn for the delay. *Ex parte Cole*, 2 All. 539.

A tenant under a written lease for a year, agreed verbally to give up possession on a week's notice if the landlord could sell the property: he remained in possession after the termination of the lease, and the landlord gave him notice to quit at the termination of the third quarter in the second year. *Semble*, That the verbal agreement formed part of the terms under which he remained in possession, and that the tenancy was properly determined by the notice. *Ibid*.

2 ——— *Semble*, That the Act 18 Vic. cap. 58, sec. 29, does not apply to a tenancy at will. *See Ex parte Irvin*, 2 All. 519.

**3—Tenant cutting trees—Clearing wilderness land—Right of property in — Justification by third party.**

If a tenant cuts down trees for the purpose of clearing wilderness land, they belong to him, and the cutting is not waste; but the *onus* lies on him to shew that they were cut for that purpose: and per Chipman, C. J., Carter, J. and

Parker, J., they should be cut with a present intention of clearing the land. But, per Street, J., if the tenant intended to clear the land at any time during the term, it was not waste. *Rector &c. of Hampton v. Titus*, 1 All. 278.

Acts which would have been waste if done by the tenant, cannot be justified by any person acting under his authority. *Ibid.*

4 ——— Rule *nisi* or summons should issue to allow party to defend as landlord in action of ejectment, when relation of landlord and tenant does not clearly exist. See *Den v. Fauls*, 1 All. 585, 638.

**5—Landlord and tenant—Writ of restitution—Title—Defence—Damages.**

The defendant, claiming to be the owner of a house of which the plaintiff was in possession, induced him to attorn and agree to give up possession on a certain day. The plaintiff, having afterwards discovered that the defendant had no title to the property, refused to give it up, whereupon the defendant took proceedings against him under 1 Rev. Stat. cap. 126, sec. 27, and obtained judgment, under which he was put in possession of the house. This judgment was reversed on appeal, and a writ of restitution awarded to the plaintiff; but before the writ could be executed by the Sheriff, the defendant pulled down the house, and thereby prevented the plaintiff from getting the benefit of his writ. The plaintiff had recovered a judgment under the 30th section of Act, for damages and costs, on account of the proceedings against him. *Held*, In an action on the case for preventing the Sheriff from executing the writ of restitution—1st. That though the defendant might be the owner of the property, having got into possession by process of law, which was afterwards set aside, he could not avail himself of his title, as an answer to the writ of restitution, and that the plaintiff had a right to be put in the same position as he was before the proceedings taken by the defendant to dispossess him; 2nd. That the judgment obtained under the 30th section of the Statute was no bar to the present action; that plaintiff was, at all events, entitled

to nominal damages, and *Seemle*, That the amount of damages was dependent upon the plaintiff's interest in the property, and whether the defendant, as owner of the property, could have immediately ejected him, after possession had been given under the writ of restitution. *Allenach v. DesBrisay*, East T. 1865, Trin. T. 1866.

**6—Writ of Restitution— inging and Issue.**

A writ of restitution awarded under 1 Rev. Stat. cap. 126, sec. 80, should be signed and issued by the clerk, under the Seal of the Court, and not by the Judge who awards it. *Ibid*.

**7—Replevin—Plea non tennit—Evidence of fraud under.**

It is competent for an assignee of an Insolvent in an action brought to replevy goods distrained for rent to shew under the plea of *non-tennit* that the premises occupied by the Insolvent and for which the defendant claims rent, were conveyed by the Insolvent to defendant to defraud his creditors, and such fraud being shewn, the relation of Landlord and Tenant would not exist between them so as to give effect to his conveyance as against creditors. *McLeod Assignee &c., v. McGuirk*, 2 Puy. 238.

**Leasehold property—Whether it passes to Assignee under assignment in insolvency—Rent—Liability of Assignee for.**

*See* Insolvent Act 28. *Robertson v. McLeod*.

**Disclaimer—Evidence of.**

*See* Disclaimer.

**Fire—Alleged negligence of tenant.**

*See* Action on the Case I. 2.

**Fixtures—Agreement as to.**

*See* Fixtures.

**Covenant for improvements New lease.**

*See* Covenant 8, 9.

**Absconding debtor—Property seized for rent.**

*See* Absconding Debtor 6.

**Bailiff—Liability of landlord for Act of.**

*See Distress 3.*

**Tenant's goods left on farm—Refusal to deliver by succeeding tenant—Conversion.**

*See Trover 17.*

**Acceptance of lease—Estoppel.**

*See Estoppel I. 3.*

**Fraudulent removal of goods—Pursuit.**

*See Distress 5, 6.*

## VIII.

**SUMMARY EJECTMENT BY LANDLORD.****Onus probandi.**

In a proceeding for summary ejectment under the Act 30 Vic., cap. 10, sec. 25, it was held by Allen, C. J., and Duff, J., that the service of the summons required by the Act issued on the necessary affidavit of the landlord, threw on the tenant the *onus probandi*, and required him to disprove the *prima facie* case made out by the affidavit, that the tenant had held over after the expiration of his lease, and had refused to deliver up possession; that the summons was, in fact, an order *nisi*, which on proof of service on the tenant become absolute, unless he shewed cause why he should not deliver up possession. If, however, the landlord goes further and attempts to prove a *prima facie* case, he must do so by legal *viva voce*, or documentary evidence, and cannot put in and read the affidavit of the landlord on which the summons was issued.

But, *Held*, per Fisher and Wetmore, J. J., that, after proof of the summons and copy of the affidavits, the landlord is bound to prove his *prima facie* case as in an ordinary trial. *Ex parte Bell*, 1 P. & B. 355.

**LARCENY.**

*See Criminal Law.*

**LEASE.**

*See Landlord Tenant.—Fishery.*



**LEAVE AND LICENSE.**

*See* Pleading—Trespass.

**LEGACY—LEGATEE.**

*See* Will.

**Bill for payment of Legacy.**

*See* Equity 9.

**Action for Legacy.**

*See* Action at Law IX. 16

**LEGISLATIVE ACTS.**

**Ultra Vires.**

*See* British North America Act—Supreme Court of Judicature—Revenue Act—Common School Act.

**LETTERS.**

**When language of letters is ambiguous, it must be construed most strictly against the writer.**

*See* Accord and satisfaction.

**LETTERS OF ADMINISTRATION.**

*See* Executors and administrators.

**LETTERS PATENT.**

*See* Crown Grant II. 1.—Corporation 6.

**Scire Facias to repeal.**

*See* Practice IV. 4.

**LEVY.**

*See* Execution.

**LIBEL.**

*See* Defamation—

**LICENSE.**

*See* Pleading—Trespass.

**OPERATION AND EFFECT.**

1-7. To cut Timber.

8. To dig Minerals.

9-14. To sell Land.

15. To sell Liquor.

16. To erect Mill Dam.

17. Fishery.

**1—To cut timber.**

A license to cut timber and remove it from lands does not enure as a grant of the trees until cut under the license. *Kerr v. Connell*, *Ber.* 133.

**2—Not assignable.**

A license from the Crown to A. to cut and take away a certain quantity of timber on a certain land is not assignable. *Sharp v. McKeen*, 2 *Kerr* 524.

**3—Conveying no interest in land—Assignable.**

A deed granting license for five years in consideration of an annual rent, to enter upon lands of the grantor, and the exclusive permission to cut and haul away any quantity of trees growing thereon fit for saw logs and timber, is a mere license, and conveys no interest in the land to the grantee, nor any property in the standing trees. *New Brunswick and Nova Scotia Land Company v. Kirk*, 1 *All.* 443.

Such a license is assignable, but the assignee in the absence of any privity of contract with the grantor is not bound to the performance of covenants entered into by the grantee. *Ibid.*

**4**———A license by the Government to cut timber on Crown land, gives the licensee no interest in the land; therefore he cannot maintain trespass under the *Rev. Stat. cap.* 133, against a person for entering on the land, and cutting down and taking away the trees. *Breckenridge v. Woolner*, 3 *All.* 303.

**5—Rights of licensee.**

A license in the name and under the signature of the Governor of the Province, and sealed with the official seal used for public documents, gives the licensee a right to cut and take away timber from Crown lands described in the license: the right of the Governor to issue such licenses being recognized by Acts of Assembly. *Beckwith v. McPhelim*, 2 *All.* 501.

*Quere*, Whether by common law a license affecting Crown lands should not be in the name of the Queen and

under the great seal of the Province, or some other authority to the Governor shewn under the great seal for issuing it. *Ibid.*

A licensee of crown land, with authority to cut and take away timber therefrom may maintain an action on the case against a person who wrongfully enters thereon and cuts the timber, in consequence of which the licensee sustains damage. *Beckwith v. McPhelim*, 2 All. 501.

**6.—License granted by Government of Canada—Liability of timber to seizure in Province of New Brunswick—Disputed territory.**

*See Crown Timber.*

**Trespass—Extent of License.**

*See Prescott v. Walton*, 2 Han. 280.

**7—Usage—Evidence.**

Regulations providing that no timber to be cut without license from the Government, first issued.

*Quere*, Whether evidence could be given of usage to the contrary. *See Coombes v. Hatheway*, 3 Kerr 592.

**8—To dig minerals—Estate—Rights.**

A license from the Crown to dig minerals in granted land where the mines are excepted out of the grant, will not justify an injury to the surface soil. *Gesner v. Cairns*, 2. All 595.

*Quere*, Whether such a license, though liable to forfeiture for non-performance of the conditions, is actually forfeited without inquest of office. *Ibid.*

A parol license from the owner of the land in which the mines are excepted, to the grantee of the mines to enter and dig them, vests no estate in the licensee, and is revoked by a conveyance of the land to a third person. *Ibid.*

Such a license is no breach of the implied warranty in a deed of bargain and sale, and the grantor is a competent witness for the plaintiff claiming under the grantee, in an action of trespass brought against the licensee. *Ibid.*

A parol assignment of such a license, (though unrevoked) gives no right of entry to the assignee. *Ibid.*

See Crown Grant, *Lesell v. Duffy*.

**9—To sell land—Probate Court—Conclusiveness.**

A license to sell land granted by a Probate Court is not conclusive upon the parties whose rights are affected by it ; but it may be shewn, in an action of ejectment for the land, brought by a person claiming title under the license, that it was obtained by fraud, or without complying with the provisions of the Act which authorizes the Probate Court to grant such licenses. *Doe v. Thompson*, 4 *All.* 488.

**Objection to proceedings in Probate Court.**

See Deed I. 40.

**10—Proof of License.**

A license by the Governor and Council to an administrator to sell land, made under the Act 26 Geo. III, cap. 11, need not be under seal ; and it may be proved by a copy from the records of the Council, certified by the Clerk of the Executive Council under the Act 21 Vic. cap. 3. *Caughey v. Inman*, 5 *All.* 399.

**11—Notice—Sale of Land.**

A notice by executors to sell land under a license from the Governor in Council under the Act 26 Geo. III, cap. 11, sec. 18, must be given thirty days exclusive of the day of sale, both by posting up notices and by publication in the newspapers ; but it is not necessary to prove that the notices continued up till the day of sale. *Doe dem. Pike v. Tierney*, *Hil. T.* 1831.

**12—License to sell—Administrator's deed—Title under—Evidence impugning.**

Where a petition to the Probate Court for a license to sell land for payment of debts contains the statements required by the Act, and due notice has been given to the parties interested, the Court has jurisdiction over the matter ; and if a license is granted and a sale of land takes place the title of the purchaser cannot be impugned in an action of ejectment, by evidence that no debts were due by

the estate at the time of the application for license. In such case, the decree of the probate Court can only be questioned by appeal. *Doe dem. Bowen v. Robertson*, 5 *All.* 184.

**Deed from administrator under license to sell—Registry.**

A deed from an administrator under license to sell for payment of debts, held good against a *bona fide* purchaser from the heir, though the deed of the latter was first registered and the application for license was not made till nine years after the death of the ancestor.]

*Semble.* That a purchase from the heir takes the land subject to the debts of the ancestor. *Ibid.*

**Petition for sale—Notice of application.**

*Quære*, Whether it could be shewn in answer to deed that no notice had been given of the application to Judge of probates. *Ibid.*

**13—Signature of Judge not necessary.**

A license to sell real estate need not be signed by the Judge of Probates : Being a judicial act, it is sufficient if it is signed by the Registrar, as the act of the Court. *Doe dem. Simpson v. Falls* 5 *All.* 540.

**14—Plaintiff cannot shew license improperly granted because of sufficiency of personal property.**

In ejectment by a devisee against a purchaser from the executor under a license from the Probate Court, the plaintiff cannot shew, for the purpose of defeating the deed, that the license was improperly granted, because the testator left sufficient personal property to pay his debts, which had been wasted and improperly expended by the executor in unnecessary proceedings in the Probate Court, of which the purchaser (being the attorney of the executor in the Probate Court) was aware : there being no want of jurisdiction shewn on the face of the petition, and such objections to the license being a ground of appeal from the decree of the Probate Court. *Doe dem. Sullivan v. Curry*, 1 *Pug.* 175.

**15—To sell liquor.**

License need not be proved in action on note given for price of liquor. *See McAuley v. Lawlor*, 2 *All.* 600.

*Prima facie* evidence of selling without license—onus of proof on defendant. *See Evidence III.* 23.

**16—To erect dam.**

Evidence of license. *See action on the Case III.* 1.

**17—Fishery.**

*See Fishery.*

**Lumber cut without license—License subsequently obtained.**

*See Trover* 30.

**Licensee of Crown land obstructing road—Not liable to trespasser on land.**

*See Action at Law*, IX. 33. *Lighton v. Bohan.*

**LICENSED TAVERN.**

*See By-law.*

Where a building used as a dancing-room was built separate from a house licensed as a tavern, but had communication therewith through a porch, and there was no other entrance to the dancing-room; *Held*, That it was a part of the house, and that the proprietor was liable to a fine under a By-law of the City of St. John for allowing music to be played therein. *Ex parte Harley*, 5 *All.* 264.

**LIEN.****I. PRINCIPLES—OPERATION.****II. PARTICULAR PERSONS.****I.****PRINCIPLES—OPERATION.**

**1** ———Where the Court allows one judgment to be set off against another, it must be subject to the attorney's lien generally, and not merely to the extent of the taxed costs in the particular suit. *Rogers v. Sedden*, 2 *Kerr* 59.

**Attorney's Lien.**

*See set off* 15. *Abel v. Light.*

**Set off of judgment in another Court—Beneficial interest.**

*See Practice XIV. 3.*

**2—Consideration—Parting with lien—Promise.**

Parting with property on which the plaintiff has a lien, may be a good consideration for an express promise, but will not support an implied one. *Hartley v. Fisher*, 1 *All.* 459.

**3**———A judgment is not such a lien upon lands, as to prevent the defendant conveying the legal title and seisin to a third person. *Doe dem. Peabody v. McKnight*, *Ber.* 376.

**4—No claim of lien—Offer to deliver logs.**

It is no objection to an offer to deliver logs that they are in possession of the owner's agent, a surveyor of lumber, who might have a lien on them, but who had not claimed any lien. *Polley v. Waterhouse*, 3 *All.* 291.

**5—Memorial.**

By the Rev. Stat. cap. 113, a registered memorial of a judgment has priority as a charge on the land of the debtor, over a subsequent judgment and execution; and a sale by the Sheriff under such execution is subject to the charge of the prior registered judgment. *Mills v. Mills*, 4 *All.* 45.

A registered memorial is a charge upon the real estate of debtor, who afterwards becomes insolvent and makes assignment under Insolvent Act. *See Insolvent Act 17. De Veber v. Austin.*

**Bankers lien.**

*Quære*, Whether such exists in this Province.

*See Pleading II. 54. Allen v. Bank of New Brunswick.*

**Assessment—Lien on real estate for purposes of.**

*See Assessment 22. Mayor of St. John v. McLeod.*

**Landlord's lien for rent.**

*See Insolvent Act, 37. McLeod v. McQuirk.*

**Boarding house keeper.**

*See*

## II.

## BY PARTICULAR PERSON.

**6—Attorney.**

An attorney has a lien on a judgment by him for his costs as between attorney and client. *Linton v. Wilson*, 1 *Kerr*, 300.

**7—Pond-keeper.**

The legal obligation of a pond-keeper is the same as that of a warehouse-keeper; and in the absence of an agreement or general usage of trade establishing a general lien, he has only a special lien on timber in his possession, for his reasonable charges for the care of it. *Jack v. Eagles*, 2 *All.* 95.

**8—Ship-owner—Freight.**

A ship-owner's lien for freight extends to every part of the goods belonging to each consignee; and the consignee cannot maintain trover for a part of the goods, which have been landed, on tendering the freight thereon, though the amount due on each package of goods may be ascertained from the bill of lading. *Neill v. Reid*, 4 *All.* 246.

**Hired men.**

*See Timber.*

**Parting with possession—Lien lost.**

*See Delivery* 4.

**Agreement giving no lien on partnership property.**

*See Equity* 2.

**Application to set off judgment against damages in other suit—Power in Court to grant application subject to attorney's lien.**

*See Set off* 8.

## LIEUTENANT GOVERNOR.

**Right to present to Rectory.**

*See Church of England* 11.

**License granted by, to sell land.**

*See License* 10.

**Salary or—Assessment on.**

*See Assessment* I. 6.



**LIFE ESTATE.**

*See* Will 3, 4, 5.

**LIGHTS.**

**Obstruction of.**

*See* Action on the Case IV. 4.

**Damages.**

*See* Damages I. 39.

**LIMITATION OF ACTIONS—STATUTE OF.**

I. GENERAL OPERATION.

II. ACKNOWLEDGMENTS—PART PAYMENT.

III. PERSONAL ACTIONS. AND PROCEEDINGS.

IV. REAL ACTIONS—ADVERSE POSSESSION.

A. RIGHT OF ENTRY.

B. TENANCY AT WILL.

C. TENANTS IN COMMON.

I.

GENERAL OPERATION.

**1—Recovery of damages—Nuisance.**

To an action on the case for a nuisance, in overflowing the plaintiff's land by a dam, which was erected, by the defendant more than six years, before bringing the action. *Held*, That the effect of a plea of the Statute of Limitations was not to bar the action but only to limit the recovery of damages to the last six years. *Connors v. McLaggan*, 2 Kerr 446.

**2—Tenancy at will.**

The 7th section of the Act of Assembly 6 Wm. IV, cap. 48, does not apply to a tenancy at will which had actually terminated before the Act passed, although the possession of the tenant continued. *Doe dem. Belding v. Belding*, 2 Kerr 534.

**3—Statute beginning to run—Subsequent disability.**

When the Statute of Limitations has once begun to run against a person, no subsequent disability in any one claiming under him will stop it; thus where A. discon-

tinued possession in 1820, and died in 1826, having a son under age. *Held*, That if the Statute began to run against A., his son had not ten years after coming of age in which to bring ejectment. *Doe dem. Thompson v. Marks*, 3 Kerr 659.

4———When Statute has begun to run, no subsequent indorsement to a person whether in or out of the Province, will stop it. *Bradbury v. Bailie*, 1 All. 690.

5———Coverture ceasing—Action brought within ten years after and within forty years after right accrued, though not within twenty years after coming of age.

*Quere*, Whether right barred. *See* Partition.

#### 6—Mortgagor and Mortgagee.

The Act 5 Wm. IV. cap. 48, sec. 2 does not apply to the case of mortgagor and mortgagee; therefore the right of the mortgagee to maintain ejectment is not barred, though the mortgagor has been in possession over twenty years, since the execution of the mortgage. *Doe v. De Veber*, 3 All. 23.

#### 6a—Right entry—Mortgage against assignee of mortgagor.

The doctrine of *Doe v. De Veber*, 3 All. 23, does not apply where the action is brought by the mortgagee against the assignee of the mortgagor, in which case twenty years' possession will bar the right of the mortgagee. Plaintiff purchased land in 1836 which was chargeable with the payment of a legacy, and took a mortgage from A. to indemnify himself against the legacy. In 1840 A. sold the mortgaged land to the defendant who went into possession and continued to occupy. In 1860 the plaintiff having been compelled to pay the legacy, brought ejectment on the mortgage; *Held*, That his right of entry accrued on the execution of the mortgage and not on the breach of the condition; and that as the defendant had been in possession more than twenty years before action brought the plaintiff's right was barred. (*Doe v. De Veber* 3 All. 23 distinguished.) *Doe dem. Falls v. Jones*, 5 All. 252.

**7—Assignee of mortgagee in possession.**

The assignee of a mortgagee in possession may set up the mortgage as a defence to an action of ejectment by the assignee of an equity of redemption, though the mortgage is more than twenty years old, and the right to recover thereon is barred by the Statute of Limitation. *Doe v. Hanson*, 3 All. 427.

**8—Disability—Insane person—Death.**

Under the 1 Rev. Stat. cap. 141, sec. 11, (Consol Stat. cap. 84,) an action may be commenced against the personal representative of an insane person, within the like period after the death of the insane person as is allowed for bringing the action in ordinary cases—death being a removal of the disability. *Fairweather v. McMonagle*, 6 All. 297.

**9—Persons beyond seas—Right of action.**

The right given by 1 Rev. Stat. cap. 139, sec. 16, to persons beyond seas to bring an action for the recovery of land within ten years after the disability ceases, does not suspend the right of action during the person's absence. *Doe dem. Fitzgerald v. Maxwell*, 6 All. 233.

## II.

**ACKNOWLEDGMENTS—PART PAYMENT.**

See Acknowledgments.

**1—No promise to pay—Acknowledgment insufficient.**

A mere acknowledgment of a debt by an administrator is not sufficient to take the case out of the Statute of Limitations; there must be an express promise to pay; and, if there is more than one administrator. *Semble*, That the promise should be by all of them. *Gibbs v. Sewell, Trin. T. 1833*.

**2—Affirmative evidence of payment necessary.**

Where part payment is relied on to take a case out of the Statute of Limitations, it is the duty of the plaintiff to give affirmative evidence of such payment, and if the evidence is doubtful and the jury find against the plaintiff the verdict will not be disturbed. *Charlotte Co. Bank v. Berry*, 5 All. 520.

**3—Title—Statement in petition.**

A statement in a petition by defendant to the Probate Court for letters of administration, that certain land in his possession belonged to the intestate, on which petition letters of administration were granted to the defendant, is a sufficient acknowledgment of title to the heir of the intestate, to prevent the operation of the Statute of Limitations. *Doe dem. Spence v. Welling*, 6 *All.* 470.

**Acknowledgment of holding land.**

*See* No. IV. 19.

**4—Before Extinguishment of right.**

An acknowledgment under section 13, 6 Wm. IV, cap. 43, to prevent the operation of the Statute of Limitations, must be made before the plaintiff's right is extinguished by the 2nd and 27th sections of the Act. *Doe v. DeVeber*, 8 *All.* 23.

**Payment on account.**

*See* Bills and Notes V. 24—27.

**5—Verbal offer to Lease—Bidding at sale.**

A verbal offer by a person in adverse possession of land to lease it from the owner, or bidding for the land at an auction of it by the owner, is not an acknowledgment of title, within the Statute of Limitations. *Doe v. Hasson*, 3 *All.* 451.

**6—Payment by mortgagor—Sale of Equity of Redemption.**

S. mortgaged land to the lessor of the plaintiff in 1837 and made payments on account from time to time, the last payment being in October, 1843. In 1842 the equity of redemption of S. was sold at Sheriff's sale by a judgment creditor, and the defendant claimed under the purchaser. *Held*, That notwithstanding the sale of the equity of redemption, the payments by S. kept the mortgage alive for twenty years from the time of that payment by 1 Rev. Stat. cap. 139, sec. 30, and that the mortgagee could recover the possession. [*See Chinnery v. Evans*, 10 Jur. N. S. 855.] *Doe dem. Fox v. Wright*, 6 *All.* 241.

**7—Letter—Acknowledgment—Insufficiency.**

A letter written by the maker of a note (against which the statute had run), to the payee, in answer to an application for payment stating that it was not in his power then to do anything in the way of payment, is not sufficient to take the case out of the Statute of Limitations. *Charlotte Co. Bank v. Ross*, 5 All. 627.

## III.

## PERSONAL ACTIONS AND PROCEEDINGS.

**Constables—Railway Act—Time in which action must be brought.**

See Action at Law XI. 11.

**Parties abroad.**

See Pleading II. 21.

**Slander—Action for—Allegations.**

See Pleading I. 7.

**Payment on account.**

See Bills and Notes V. 26, 27.

**Damages—Recovery limited.**

See Damages III. 1.

**When right of action accrues—Parties abroad.**

See Bills and Notes V. 24.

**Note payable in instalments.**

See Bills and Notes V. 25.

**1—Issuing writ—Alteration of—Replication.**

A replication to a plea of the Statute of Limitations, stating the suing out of a writ on a certain day within six years, is not proved by a writ originally sued out on that day, but afterwards altered and made returnable on a different day—the day of the alteration being considered the issuing of the writ. *Barlow v. O'Donnell*, 1 All. 433.

2—Where the plaintiff altered the return day of a writ from the first to the last day of a term, in consequence of which a verdict in his favor was set aside, the Court refused an application to amend the writ by striking out the alteration and restoring it to its original form, though the

plaintiff was barred by the Statute of Limitations from bringing a fresh action. *Barlow v. O'Donnell*, 1 All. 561.

3—Debt barred by Statute for which process issued, the Sheriff may show this under general issue. See Sheriff 11.

**Writ issued—Leave to file Entry Docket—Writ issued in time to save Statute—Leave given to file Entry Docket nunc pro tunc.**

See Practice III. 4, *Taylor v. Gerow*.

#### IV.

#### REAL ACTIONS—ADVERSE POSSESSION.

Rebuttal of plaintiff's title. See Ejectment I. 4.

**1—Question of fact of adverse possession should be left to jury—Previous Act of Assembly.**

Where A., a *feme sole* was, previous to her marriage, in the actual occupation, jointly with her brother, of lands which descended to them from their father, and upon her marriage, left the possession in her brother, who occupied more than forty years, paying during that period, all taxes and charges thereon, and receiving all the rents and profits. *Held*, In ejectment brought by the heirs of A., that under the Act 6 Wm. IV, cap. 48, sec. 14, which provides—that if at the time of the Act coming into operation, the possession is not adverse, the right of entry should not be barred for five years,—the question of adverse possession should be left to the jury to determine, and that it should be decided according to the law as it stood when the Act came into operation. *Doe dem. Cole v. Harper*, Ber. 289.

**2—Confined to what?—Evidence of Possession—Unimproved land.**

The adverse possession of one entering without colour of title, is confined to the particular part occupied; and the cutting down and carrying away of trees by such person on adjacent wilderness land, will not constitute an adverse possession of such wilderness land, unless the same be inclosed, or the extent of possession defined by a clear demarcation of boundaries. *Doe dem. Des Barres v. White*, 1 Kerr 595.

If repeated acts of trespass on wilderness land will constitute a possession of the land, it is necessary in order to make out such adverse possession of twenty years as will bar the right of the owner under the Statute of Limitations, to shew a sufficient number of such acts before the commencement of the twenty years. *Ibid.*

The grantee of the Crown, according to the ordinary mode of granting the wild lands in this Province, being deemed *prima facie* in possession of the land granted when there is no adverse occupant, it is sufficient for a plaintiff in ejectment, who claims under a grant to his lessor more than twenty years old, to shew that the land within that period remained in its natural state and unclosed. *Ibid.*

3 ———— A being seized of a lot of land, died intestate in the year 1811, leaving five children. B. his second son, took possession of the land, and exercised acts of ownership over the whole of it until 1824, when he conveyed it to the defendant, who afterwards occupied it. *Held*, that B.'s possession was not limited to his undivided share, but extended over the whole lot, and that after twenty years the right of the heirs of A.'s eldest son was barred by the Statute of Limitations. *Doe v. Allen*, 2 *All.* 191.

#### 4—Continuous possession.

The plaintiff's father conveyed him a farm, on an agreement that fifty acres of it should go to pay a debt of the father. The debt not having been paid, the fifty acres were sold by the Sheriff with the plaintiff's consent in 1824, and purchased by C., who had the boundaries marked with the plaintiff's assistance. C. several years after sold to the defendant, who held up to the same line until 1851, without objection by the plaintiff. *Held*, That there was a continuous possession of the whole fifty acres for upwards of twenty years in C. and the defendant, which gave the latter title to the land. *Doe v. Baxter*, 2 *All.* 377.

#### 5—Necessary facts to constitute adverse possession.

In order to constitute an adverse possession of land, it must be exclusive, continuous, and clearly defined: there

must be something to shew the person having the legal title, that a possession has been taken of some definite portion of the land hostile to his title. *Doe dem. Mayor &c. of St. John v. Littlehale* 5 All. 121.

Where the land above high water was granted to one person, and the beach in front, between high and low water mark, to another, the merely passing over the shore with boats at high water, or the landing boats on the shore at low water by the proprietors of the land above high water mark, and passing to and fro over the beach for a period of twenty years, does not amount to a possession; there being nothing to define a possession of any particular portion of the land, and the acts being consistent with the exercise of a public right of passage when the beach was covered with water, and, with an easement in the proprietor of the adjoining land when the beach was uncovered. *Ibid.*

#### **6—Possession—Survey.**

An entry or survey of land by the owner is not such a possession as will prevent the operation of the Statute of Limitations, 6 Wm. IV., cap. 48, or divest the possession of one holding the land adversely at the time of the entry. *Doe v. Hasson*, 3 All. 451.

#### **7—Extent of possession—Description in deed—Unoccupied remainder.**

A. being indebted, conveyed land (partly wilderness) to the plaintiff in 1822, and two years afterwards, in order to pay the debt, caused fifty acres of the land to be sold at auction by the sheriff, with the plaintiff's consent, and B. purchased it: the plaintiff bid at the sale, signed the Sheriff's deed as a witness, and assisted B. in running the division line between the fifty acres and the remainder of the land towards the rear of the lot; B. sold to the defendant in 1835, and the plaintiff then continued the division line to the rear; and occupied up to it for several years. *Held*, That as B.' entry was not wrongful, his actual possession of a part (there being no other possession of the remainder) extended to the whole of the land described in the deed, and that the plaintiff's right was barred at



the expiration of twenty years after B.'s entry. *Held also*, That the Sheriff's deed was properly received in evidence as part of the *res gestæ*, without proof of any judgment or execution to warrant it. *Doe v. Baxter*, 4 All. 181.

**s**———The vendor of part of a tract of land sent a surveyor to lay it off for the purchaser (defendant). The surveyor pointed out a tree to the purchaser as his boundary, up to which he took possession, and occupied upwards of twenty years. *Held*, That he had acquired a title by possession up to that tree, though it did not correspond with the description in his deed, which deed was prepared from a plan of the survey made by the surveyor after he laid off the land and the principal part of the land was wilderness, the jury having found that the defendant's possession was up to the tree. *Doe dem. Robinson v. Chase*, East T. 1864.

**9—Acts—Whether of possession or trespass—Question left to jury.**

In trespass for taking grass, plaintiff proved that she and her deceased husband had cut the grass on the *locus in quo*, (a wild meadow—the grass being wild and natural,) for upwards of twenty years: there was no fence on the land, or any other act of possession shewn. The defendant had the legal title to the land and lived on the front of the lot,—about four miles from the *locus in quo*,—occasionally cutting lumber on the rear of it near the meadow, and browing his lumber thereon. It was left to the jury to say whether the several acts of cutting the grass by the plaintiff were acts of possession,—claiming it as a right,—or mere act of trespass; and the jury found in favor of the defendant. *Held*, No misdirection. *Power v. Howie*, Mich. T. 1864.

**10—Continuance of possession—Character of holding—Original claim—Rebuttal of presumption.**

Defendant went into possession of land under an agreement to purchase from his brother. W. the plaintiff's father, paid the purchase money, built a house and occupied the land. After the death of W., the plaintiff, then an infant, 5 years old, went to live with the defendant on

the land, and was maintained by him for a number of years. *Held*, (N. Parker and Wilmot, J. J., *disientibus*) That the presumption was that the defendant continued in possession under his original claim of right, and that the plaintiff's living with him on the land, did not necessarily destroy that right; but that such presumption of right might be rebutted; and, that it was a question for the jury whether certain acts of the defendant after W.'s death, shewed that he was holding the property as his own, or for the benefit of the heirs. Per. N. Parker and Wilmot, J. J.—That the plaintiff's occupation on the land must be presumed to have been in his character as heir of W., and that it was not a question for the jury. *Doe dem. Spence v. Welling*, 6 All. 470.

**Continuance of possession by widow after death of husband—For whom holding—Adding possession to give title.**

*See Possession 4.*

**11—Registered deed—Acts of possession necessary—Entry under deed or as trespasser.**

There is a distinction in the character of the possession where a person enter on land under a registered deed, and where he enters without any claim of right. It should be left to the jury to say whether the entry was made with the intention of taking possession under his deed, or as a mere trespasser. The mere fact of a party having a registered deed of land, does not operate to give him possession of the land therein described, without shewing acts of possession. *The Madras Board v. Ryan Mich. T. 1864.*

**12—Defined boundaries—Possession of part—Intention—Title to whole.**

If a person enters on land under a registered deed, with defined boundaries, with the intention of taking possession as owner, and not as a mere trespasser, he may be considered as taking possession of the whole lot described in the deed, and not merely of that part actually occupied or enclosed; and such possession, if continued for twenty years, will give a title. It is a question for the jury, with

what intention a party enters on land. (Per Parker, Wilmot and Ritchie, J. J., Carter, C. J., and N. Parker, M. R., *dissentientibus*.) *Humphries v. Helms*, 5 *All.* 59.

**13—Acts done by persons claiming title.**

Acts which in the case of a person who enters on land without claim of title, may be treated as mere acts of trespass, may, when done by a person under claim of title, be considered acts of ownership. *Ibid.*

**Possession of plaintiff—Whether amounting to disseisin or not.**

*See* Disseisin 5, *Payson v. Good*.

**Inconsistent evidence as to possession—Verdict of jury for all but improved land.**

*See* New Trial III. 49.

**14—Possession of part of lot—Constructive possession of whole—Adverse possession.**

The constructive possession which a grantee in possession of a part under a registered deed describing a lot of land by metes and bounds has of the whole lot, is not sufficient to give him the title to any portion against one who has had for a lengthened period the active and continuous possession. *Doe dem. Van Buskirk v. Corney*, 2 *Pug.* 233.

**15—No Documentary or other title—Possession—Finding of jury not interfered with.**

As between parties without title, each seeking to make a title for himself, the court will not interfere with the finding of a jury unless clearly and unequivocally wrong. *Eastbrooks v. Brean*, 2 *Pug.* 304.

**16—Husband and wife—Parol gift to wife—Possession under—Title in whom.**

Where there was a parol gift of land to a married woman, and the property was actually occupied by the husband of the donee and worked by him, she residing with him as his wife. *Held*, That the wife could acquire no title by such a possession either against her husband or the donor—the title so acquired would be the title of the husband.

*Quære*, Whether where a party gives land to another by parol and puts him in possession, this might not be considered

a discontinuance of the owner's possession, and the Statute of Limitations begin to run at once, and not at the end of the year. *Doe dem. Vincent v. Murray*, 2 *Pug.* 375.

#### A. RIGHT OF ENTRY.

##### **17—Agreement—Tenancy at will—Heirs.**

A. the owner of land, put B., in possession in 1799 under an agreement to purchase. In 1820, the heirs of A. demanded possession of the land from B. who refused to give it up. *Held*, That by entry under the agreement, B. became tenant at will to A.; that under the Statute of Limitations 6 Wm. IV. cap. 43, such tenancy terminated at the end of one year after B. went into possession; and that the action not having been brought within twenty years thereafter, the right of the heirs was barred by the Statute. *Doe dem. Purdy v. Peters. Ber.* 350.

##### **18—Entry of owner with consent of tenant.**

Defendant went into possession of land as tenant at will to plaintiff, and remained in possession upwards of twenty years. *Held*, That such tenancy was not determined by an entry of the owner within twenty years with the consent of the tenant for the purpose of running the line between his possession and the adjoining land, and therefore that the plaintiff's right of entry was barred by the Statute of Limitations. *Doe dem. Botsford v. Tidd*, 5 *All.* 569.

##### **19—Payment on account of mortgage—Purchaser of Equity of Redemption—Action brought within twenty years of payment.**

S. mortgaged land to the lessor of the plaintiff in 1837, and made payments to him on account from time to time—the last payment being in October 1843. In 1842, the equity of redemption of S. was sold at Sheriff's sale, and the defendant claimed under the purchaser from the Sheriff. *Held*, That the mortgagee could maintain ejectment for the land within twenty years after the last payment by S. *Doe dem. Fox v. Wright*, 6 *All.* 241.

**20—Female infant—Marriage—Husband bound to bring action within twenty years after right of entry of infant.**

A right of entry accrued to a female infant in 1826, and in 1830, a few months before her infancy ceased, she married the plaintiff, who brought action to recover the land in 1848. *Held*, That he being under no disability, was bound to bring his action within twenty years after her right of entry accrued, and therefore that his right was barred. *Starkie v. Parkes*, 1 *All.* 556.

*Semble*, That though the husband's right was barred by the Statute of Limitations, that of the wife was only suspended during her disability. *Ibid.*

**21—Devise to widow for life—Children's right of entry.**

A testator, after directing that so much of his estate as was necessary should be sold for payment of his debts, devised all the residue of his estate to his executors, in trust to hold for the separate use and benefit of his wife during her life or widowhood, and to pay her the income thereof; and after her death or marriage then to be divided among his children. Defendant took possession of the land in 1831, after the testator's death; the widow died in 1856. *Held*, That the children's right of entry did not accrue until the widow's death, and their title was not barred by the Statute of Limitations. *Doe v. Driscoll*, 4 *All.* 176.

**22—Unoccupied land—Grantee—Seisin—Possession.**

A grant of land from the Crown, under the great seal, with a plan of survey annexed, conveys seisin to the grantee, and his possession will *prima facie* be deemed to continue while the land remains unoccupied and unimproved. *Held*, therefore, That an adverse possession of ten years in the defendant would not bar the entry of the lessors of the plaintiff, who claimed as heirs of the grantee under a grant made in 1785, the land being shewn to remain unoccupied until the time of the defendant's possession. *Doe dem. Kimpson and wife v. Craft*, 1 *Kerr* 546.

**23—Sufficiency of adverse possession—Acknowledgment of holding.**

Where land was granted by the Crown to L. S., who

let F. into possession over forty years ago, and F. had acknowledged that the land was held by him under L. S. and his heirs, and had paid rent to the widow of L. S., and had also in 1822 agreed with one of the sons of L. S. to hold the land until it was called for by the owners, and had shortly after died in possession. *Held*, That the defendant who had come in under B., who obtained possession from the widow and family of F., had not such an adverse possession as to bar the entry of the heirs of of L. S. *Doe dem. Stranger v. Thompson*, 1. *Kerr* 564.

Coverture ceasing, action brought within ten years and within forty years after right accrued, though not within twenty years after coming of age. *Quære*, If sufficient. *See* Partition.

#### B. TENANCY AT WILL.

##### **24—Determination of tenancy.**

In ejectment, the defendant, by virtue of the Act of Limitations 6 Wm. IV., cap. 43, sec. 7, relied on a tenancy at will, created more than twenty years before the commencement of the action. *Held*, That cutting down and carrying away wood from the premises in question, and making surveys upon it, and any such entry without the consent of the tenant at will, would operate as a determination of the tenancy. *Doe dem. Lyon v. Slavin*, 3 *Kerr* 258.

**25**———A person taking possession of land under an agreement to purchase, which specified no time for the continuance of the possession in the event of the purchase not being completed, becomes a tenant at will; and such tenancy must be terminated by some act of the parties before he can be ejected on non-completion of the purchase. *Doe v. Denny*, 3 *All.* 50.

The Act 6 Wm. IV., cap. 43, sec. 7, does not apply to such a case; but only to questions arising under the Statute of Limitations. *Ibid.*

**26**———T. P. put C. in possession of land to hold for him and keep trespassers off, with liberty to cut the grass and fire-wood upon it: C. held it until his death in 1821

(nearly thirty years), but never claimed it as his own ; on the death of C., his son D. succeeded to the possession and continued to hold the land as his father had done, till T. P.'s death, and afterwards for W. P., the son, and one of the heirs of T. P., until 1844, when he conveyed it to C. P., a son of W. P., under whom the plaintiff claimed by a deed dated in 1856. The defendant claimed under J. P., a grandson and one of the heirs of T. P., who entered on the land after the conveyance to C. P. in 1844. *Held*,—1st. That C. was not a tenant for years to T. P., subject to a rent service, but at most a tenant at will, and that such a tenancy terminated at his death in 1821; 2nd. That the holding by D. created a new tenancy at will between him and the heirs of T. P., which terminated in 1823, and that at the expiration of twenty years therefrom the right of T. P.'s heirs was barred, and D. had the fee simple—the five years allowed by the 14th section of the Statute of Limitations, 6 Wm. IV., cap. 43, having expired on the 1st January 1842; 3rd. That as the plaintiff, being the heir of C. P., might claim by descent, the Judge was right in refusing to leave to the jury, whether at the time C. P. conveyed to the plaintiff, he was not disseised by the entry and possession of J. P. *Doe v. McGloyn*, 4 All. 189.

See Supra I. 2.

**27—Arrangement with party making him tenant at will—Owner entering—Exclusive possession of part.**

Where a party was allowed to enter on a lot of wilderness land, with the privilege of clearing and chopping a portion of it, but under such an arrangement as to the remaining portion as would make him a tenant at will of the whole; but the owner also entered from time to time and cut and disposed of the timber. The Statute of Limitations was *held* not to run in favor of the tenant except as to the part exclusively occupied by him. *Doe dem. McKenzie v. Masher*, 2 Pug. 355.

**28—Determining tenancy.**

Any act upon the land by the person having title for

which he would be otherwise liable as a trespasser amounts to a termination of a tenancy at will. *Doe dem. Botaford v. Tidd*, 5 *All.* 569.

### C. TENANTS IN COMMON.

**29**——As between tenants in common, the right of one tenant to bring ejectment within five years of the Act of Limitations (6 Wm. IV., cap 48) taking effect, is saved by the sixteenth section, where the possession was not adverse according to the law existing at the time when the Act took effect. *Doe dem. Williams v. Leavitt*, 2 *Kerr*, 88.

**30**——A., being in possession of land as tenant in common with his brother and sister, went away from the property in 1820, leaving his mother, brother and sister in possession; the defendant married the sister and bought the brother's share in 1824, but the brother remained in possession until 1831, receiving the whole of the profits for the purpose of supporting his mother—to which all the family considered themselves bound to contribute. A. died in 1826, leaving a son, the lessor of the plaintiff, under age, who brought ejectment in 1846. *Held*, That up to 1831, there was no exclusive possession in any one of the tenants in common to bring the case within the Act 6 Wm. IV., cap. 48, sec. 12; that the statute did not begin to run against A. in his life-time; and that the right of the lessor of the plaintiff was not barred. *Doe dem Thompson v. Marks*, 3 *Kerr* 659.

### LIMIT BOND.

*See Bonds—Bail—Practice.*

### LIQUORS.

#### **Sale of—Restraining of.**

*See B. N. A. Act.*

#### **Conviction for selling without license**

*See Justice of Peace.*

### LIVERY OF SEISIN

#### **Grant of land conveys seisin.**

*See Crown Grant II. 4.*



**Allowing party to give evidence of seisin.**

*See Evidence VIII. 12 a.*

**Party in possession—Presumption of livery of seisin.**

*See Deed I. 20.*

**Fact of Seisin—Circumstances.**

In order to shew livery of seisin under an unregistered deed, the grantee shewed that after the deed was delivered he and the grantor were passing by the land, when the latter said to him, "Here is your estate, it don't belong to me—I have deeded it to you," and that the grantee took hold of a part of a building on the land, and said he thought he would repair it, and put tenants in; and that he afterwards exercised ownership over it. The grantee afterwards became insolvent, and in the schedule of his property, filed pursuant to the Act 7 Vic. cap. 32, this property was omitted. *Held*, That the jury were warranted in coming to the conclusion that livery of seisin had been given. *McLardy v. Flaherty*, 3 *Kerr* 455.

**Local Legislature.**

*See B. N. A. Act.*

**LOCUS STANDI.****Right to have—Contesting title.**

*See Practice in Equity II. 4.*

**LOST RECORD.**

*See Judgment I. 6.*

**LUNATIC.****Setting aside proceedings against.**

*See Practice VI. 15.*

**Deed of.**

*See Deed I. 35.*

**Disability.**

*See Limitations—Statute of, I. 8—Fairweather v. Mc-Monagle.*

**Lunatic's estate—Committee of—When action against not sustainable.**

*See Action at Law IX.*

**MAGISTRATE.**

*See* Justice of the Peace.

**MALICE.**

**False return of Member—Proof of actual malice necessary to sustain action against Sheriff for making.**

*See* Election Law.

**Practice of striking out names of persons refusing to take oath admissible in question of malice.**

*See* Evidence III. 7.

**Registrar refusing to register.**

*See* Pleading I. 56.

**Proof of—When unnecessary in question of negligence.**

*See* Action on the Case II.

**Influence of malice.**

*See* Criminal Law II. 4—Malicious Arrest. &c.

**MALICIOUS ARREST AND PROSECUTION.**

REASONABLE AND PROBABLE CAUSE.

**Arrest.**

Proof of signature of defendant to affidavit unnecessary, if arrest made by his procurement. *See* Evidence VII. 5.

**Excessive damage—New trial not granted unless damages outrageous.**

*See* New trial III. 11.

MALICIOUS PROSECUTION.

**1—Evidence—Copy of indictment.**

A copy of an indictment certified by the proper officer, though improperly obtained, is admissible in evidence in an action for malicious prosecution. *Heany v. Lynn, Ber.* 27.

**2—Prosecutor.**

Defendant charged the plaintiff with stealing, on which he was indicted at the Sessions, and acquitted. The prosecution was conducted by the Clerk of the Peace; but the defendant consulted with him, and procured the attendance

of the witnesses. *Held*, Sufficient evidence that the defendant was the prosecutor. *Burgoyne v. Moffat*, 5 All. 13.

**3—Motive.**

Any motive for a prosecution, other than that of wishing to bring a guilty party to justice is evidence of malice. Retaining the Clerk of the Peace to prosecute an indictment against the plaintiff, before the Sessions, together with the conduct of the prosecutor before and after, are proper matters to be left to the jury on the question of malice. *Alward v. Sharp*, 1 Han. 286.

4—Any motive for a prosecution, other than that of bringing a guilty party to justice, is a malicious motive. Malice may be inferred from the want of probable cause; and the inference is strengthened where the defendant does not come forward as a witness to rebut it. *Burgoyne v. Moffat*, 5 All. 13.

**5—Proceeding against party by summons sufficient without warrant.**

It is not essential to the maintenance of an action for malicious prosecution for a crime, that a warrant should have been issued against the plaintiff and that he should have been arrested. It is sufficient that he has been proceeded against by summons on the defendant's complaint. Where the declaration alleged that a warrant had been issued against the plaintiff, and that he had been arrested on the charge, an amendment was allowed, substituting therefor, that a summons had been issued by a Justice of the Peace and served upon the plaintiff, and that he attended before the Justice in obedience thereto. *Vincent v. West*, 1 Han. 290.

**6—Detaining debtor, after payment of debt.**

An action will not lie for maliciously, and without probable cause, detaining the plaintiff in prison after payment of the debt for which he was arrested, unless a legal determination of the suit is shewn; or the plaintiff had been ordered to be discharged by the Court. *McPhelim v. Weldon*, 5 All. 358. See Action at Law.

## REASONABLE AND PROBABLE CAUSE.

**7—Proceeding criminally against party.**

Plaintiff was a boarding-house keeper, in whose house defendant had boarded, having the use of a room, and some furniture of his own. He went to England, leaving his furniture in the house, and after being absent several months, applied through his agent, to the plaintiff for the furniture; she gave up a portion of it, but kept the rest, claiming a lien on it for a balance due from defendant for board. Defendant then brought an action of replevin for the furniture, and obtained a verdict, the Judge ruling that a boarding house keeper had no lien on the goods of his guest. Before and after the trial negotiations for settlement took place between the attorneys, plaintiff offering to give up the goods on being paid a certain sum, which defendant refused, offering a smaller sum. The plaintiff's counsel applied for a new trial in the action of replevin, on the ground of misdirection as to the lien, and the Court, after a few days consideration, refused a rule. While this motion was pending, and while the plaintiff's counsel was absent from the town where she lived, attending the Court, defendant again applied to her for the furniture, offering her a sum of money if she would give it up in the absence of her attorney, and threatening to take proceedings against her and ruin her house if she refused: the plaintiff still claimed a right to hold the furniture, and refused to do anything in the absence of her attorney. Defendant then applied to the police Magistrate, and obtained a warrant against the plaintiff under the Act 27 Vic. cap. 6, for unlawfully, as a bailee, detaining his property and converting it to her own use, under which warrant she was arrested and imprisoned for want of bail, and on examination, the charge was dismissed. In an action for malicious prosecution and false imprisonment, the jury were directed that if the plaintiff was a bailee of the goods, and fraudulently converted them to her own use, the defendant had probable cause for the prosecution, whatever he might have believed on the subject; that if plaintiff had not fraudulently

converted the goods, if defendant believed, and had reasonable grounds for believing that she had done so, there was also probable cause; but if he did not believe plaintiff to be guilty of fraudulent conversion, and in his own mind believed and had reasonable grounds for believing her innocent, then there was want of reasonable and probable cause. *Held*, That the direction was right; that the knowledge and belief of the defendant as to the plaintiff's claim to hold the goods, and his acts in reference thereto, and the inferences to be drawn from the acts of the parties, the negotiations for settlement, the claims by one party and the offers by the other, were proper matters for the consideration of the jury; and that the Judge would not have been justified in directing the jury, that as the plaintiff had no legal right to detain the goods, her refusal to give them up, afforded probable cause for instituting the prosecution against her under the Act. *Held* also, That under the circumstances, a verdict for £500 damages was not excessive, it not being shewn that the jury were actuated by any improper motive, or acted on a wrong principle. *Abell v. Light*, 1 *Han.* 240.

#### **8—Inferences from facts—Jury.**

Where inferences are to be drawn from the facts proved in an action for malicious prosecution, the case must be left to a jury; and the question of "probable cause" should not be determined by the Judge alone. *Alward v. Sharp*, 1 *Han.* 286.

#### **9—Conflicting evidence—Determination of—Reasonable and probable cause.**

When the evidence, tending to show whether the plaintiff was or was not guilty of the crime charged against him, is conflicting, the Judge cannot determine the question of "reasonable and probable cause." *Vincent v. West*, 1 *Han.* 290.

#### **10—Verdict—Uncertainty as to grounds of finding.**

Where the evidence of want of probable cause was such, that it should have been decided by the Judge against the defendant; but he left both that and the question of malice

to the jury, who found for the defendant, a new trial was granted ; as it could not be known whether the verdict was given on the ground that there was probable cause (which would have been contrary to law) or that there was no malice. *Hughson v. Keith*, 5 All. 59.

**Policeman—Acting in bona fide belief of duty.**

See Action at Law XI.

**11—Malicious prosecution — Termination of proceedings.**

Defendant made complaint before a magistrate that the plaintiff had threatened to shoot him, whereupon a warrant was issued and the plaintiff arrested and brought before the magistrate, who, after hearing the parties, dismissed the complaint. *Held*, in an action for malicious prosecution, That there was evidence of the termination of the proceedings before the magistrate. Malice is not a question for the Judge to determine. *Wasson v. Taylor*, 1 Han. 102.

**Lodging complaint before Justice.**

See Trespass V. 14, *Brown v. Moore*.

### MALICIOUS INJURIES.

See Criminal Law.

### MANDAMUS.

#### A. WHEN GRANTED.

To Inferior Courts—Corporation—To enforce Contract—Alternative Mandamus.

#### B. WHEN REFUSED.

To Inferior Courts — Corporation — General Sessions — Justice of Peace—Foundation for Application—Affidavit entitling of — Return to — Other Remedy — Mandamus Refused.

#### C. MISCELLANEOUS.

#### A. WHEN GRANTED.

**1—To Inferior Courts—To enter Judgment.**

A mandamus will issue to compel the Court of Common

Pleas to enter up judgment on a verdict, the Court having no power to grant a new trial. *Rex v. Justices of Northumberland, C. Ms.* 8.

### **2—To try Cause.**

Where the presiding Justices of the Common Pleas, who were also Justices of the Peace, refused to try a cause because from their position and knowledge as Justices of the Peace, they believed that the defendants (who were a committee of the Justices) had contracted with the plaintiff in their public capacity for the performance of public work; the Court granted a mandamus to the Justices of the Common Pleas generally, to try the cause. *Ex parte Leonard*, 1 *All.* 269.

### **3—To perfect judgment.**

The provisions of the Act 35 Geo. III. cap. 2, are imperative as to the time within which a defendant may appear in the Inferior Court in a suit, and if he does not appear within such time, he cannot afterwards be let in to defend, and the plaintiff is entitled to a mandamus to perfect his judgment. *Rex v. Justices of York, Hil. T.* 1831.

### **4—Corporation.**

A mandamus lies to the Corporation of St. John to compel them to collect a moiety of the amount assessed and apportioned by the Commissioners on the parties benefited by the extension of a street, under the Act 23 Vic. cap. 44. *Ex parte Jones*, 5 *All.* 183.

### **5—To enforce contract—Public work.**

A mandamus lies to enforce a contract entered into by a person with public officers for the performance of public work, on which he has the legal right to the money, but no legal remedy by action, though a third party was secretly interested with him in the performance of the work, and claims the money under an arbitration to which they had submitted their disputes. *Regina v. Justices of York*, 1 *All.* 273.

### **6—To restore pilot.**

The right of the Corporation of Saint John to appoint pilots under its Charter has been recognized by Act of As-

sembly ; and the tenure of such appointments being during pleasure, if the Corporation remove a pilot without assigning any cause, a mandamus will not lie to restore him, *Ex parte Langan*, 3 *All.* 185.

**6 c—Appraisers of damages—Alternative mandamus.**

An application for a mandamus to the appraisers of damages under the Act 19, Vic. cap. 17, requiring them to assess the value of land taken for a railroad, was resisted on the ground that the right of way had been given to, and the track laid out by the European and North American Railway Company under a deed executed by the applicant; that all the right of that Company had been transferred to the Government ; and that the land taken by the Government was identical with that laid out by the Company. *Held*, That as this identity was left doubtful by the affidavits, an alternative mandamus should issue. *Ex parte Gray*, 4 *All.* 118.

**B. WHEN REFUSED.**

**7—Inferior Court—Entering judgment.**

The Court will not grant a mandamus to the Justices of an Inferior Court of Common Pleas, requiring them to enter up judgment for the plaintiff in an action of recognizance of bail in that Court ; when such Justices had in the exercise of their discretion set aside the plaintiff's judgment and allowed a render of the principal. *Sedden v. Russel*, *Ber.* 217.

**8—Inferior Court—To award Costs.**

A mandamus was refused to compel the Court of Common Pleas to award costs to a plaintiff in an action on a bond after a verdict in his favour—it being a summary action, and the pleadings subsequent to the declaration being special and not according to the summary Act 12 Vic. cap. 40. *Ex parte Griffith*, 2 *All.* 98.

*Quere*, Whether the jury had power to try such an issue. *Ibid.*

**9—Corporation—To issue notes.**

The Act 18 Vic. cap. 6, authorized Commissioners to



convey water into the Town of Carleton from certain lakes, and for that purpose to purchase the water rights, a portion of the lands round the lakes, and the land necessary for laying down water pipes, to distribute the water in the town and carry off waste water; and in order to pay for the water rights and lands taken, and for the construction of all necessary works and all incident expenses, the Corporation of Saint John were authorized and required on the requisition of the Commissioners, to issue from time to time, notes or certificates of debt to an amount not exceeding £25,000. The Commissioners entered into a contract for laying down the pipes and conveying the water from the lake into the town for £23,000, and required the Corporation to issue notes for that amount, which they refused. *Held*, That as it was not shewn that the Commissioners had not made any arrangements for carrying out the other provisions of the Act, or that the balance of the sum limited would be sufficient for that purpose, the issuing of the notes was discretionary with the Corporation, and that a mandamus would not be granted. *Ex parte Coster*, 3 All. 849.

**10—General Sessions—To pay for work—Sheriff.**

A mandamus was refused to compel the General Sessions of St. John to pay for work done at the gaol by direction of the Sheriff, it not appearing that they had authorized the Sheriff to have it done. *Ex parte Thomas*, 5 All. 856.

**10 a**——Mandamus refused to compel Magistrate to proceed in a criminal cause at suit of private prosecutor. *See Regina v. Duwaney*, 1 Han. 571.

*See No. 14.*

**11—Commissioners of Sewers—Damage—Foundation for application against—Compliance with Act—Powers under—Request—Demand.**

The Act 2 Wm. IV., cap. 26, incorporating the St. John Water Company, authorized them to draw water from, erect reservoirs on, and carry pipes through private property, provided that no such water should be drawn,

etc., without compensation being paid for the use of the same, and for any damage sustained by the operations of the Company, and in case of disagreement between the Company and the owners of the land, the compensation to be determined by arbitration; and if the owner of the property should decline to appoint an arbitrator, the Supreme Court, on application of the Company, should issue a warrant to the Sheriff to summon a jury to assess the amount to be paid. By Act 12 Vic. cap. 51, further powers were given to the Company to enter on private property, erect dams, and draw water from any stream, on paying compensation to the owners—the amount to be determined as by the Act 2 Wm. IV., cap. 26. After the passing of this Act, the Water Company erected a dam upon a stream flowing through private property, laid down pipes and diverted the water from its natural channel, without the consent of the owners. By Act 18 Vic. cap. 38, all the property, rights, powers and privileges of the Water Company were vested in Commissioners appointed under this Act, saving to all parties all rights, remedies and actions, for any act done, or for any contract theretofore made, and giving the Commissioners power to lay down pipes, etc., for extending a supply of water; and providing that in case of damage done in the execution of the works, the Commissioners should pay the party sustaining the same, such compensation as should be agreed upon, and in case they could not agree, the Commissioners should, on request of such party, apply to a Justice of the Peace for a warrant to the Sheriff to summon a jury to assess the damages. The Commissioners continued the obstruction placed on the stream by the Water Company, and laid down additional pipes, drawing off a much larger quantity of water. A., claiming as one of the heirs of the former owner, then gave notice to the Commissioners that he claimed damages under the Act 2, Wm. IV, cap. 26, and the several Acts in amendment and incident thereto, for abstraction of the water by the Commissioners, and requested them to take the necessary steps for summoning a jury to assess such damages. The Commissioners de-

clined to take any steps, and A. gave them a further notice, stating that they had refused to agree upon the amount of compensation for obstructing the stream and diverting the water, and requiring them to take the necessary and legal steps pointed out by the Acts 2 Wm. IV. cap. 26, 12 Vic. cap. 38, or any of them, for determining the amount of compensation to be paid for all or any damage which he was entitled to receive in his own right or in behalf of the other heirs, as well for the acts of the St. John Water Company as of said Commissioners. The Commissioners declined to take any proceedings on this application, stating that they were not aware that any damage had been done to A. by their operations. *Held*, on application by A. for a mandamus—1st. That the Commissioners were right in refusing to act on the first notice—the mode of proceeding under the Acts 2 Wm. IV. cap. 26 and 12 Vic. cap. 51, being by arbitration, and not by a jury; 2nd. That the Commissioners had no power to act under the 2 Wm. IV. cap. 26, even if they had been requested to take the proceedings pointed out by that Act; 3rd. That as all rights and remedies against the Water Company were preserved by the 18 Vic. cap. 38, the Commissioners were not bound to apply for a jury to assess damages for the acts of the Water Company, as required by the second notice; 4th. That without showing who the other owners of the property were, and how A. was entitled to claim on their behalf, a mandamus could not be issued to assess the damages due to them, but must be confined to A.'s interest in the land; 5th. That it was sufficient for A. to show by his affidavits a *prima facie* case of title to the land, and that he need not produce his deeds; 6th. That the allegation of the withdrawal from its natural course of a large quantity of water from a stream flowing through A.'s land, showed a *prima facie* case of damage to him; 7th. That a demand in the alternative, to do one of two things, and a general refusal, was sufficient to found an application for a mandamus, if the applicant was entitled to part of what he claimed; 8th. That a request to a public officer, to take the necessary and legal steps pointed out by an Act of Assembly, to

assess damages for the injury done to the applicant's property under the authority of the Act. was sufficiently specific ; 9th. That an objection that there had been no sufficient demand could not be taken after the merits of the application had been discussed ; 10th. That where an application for a mandamus fails, because there was no demand and refusal, it cannot, as a general rule, be renewed after a demand ; though there may be circumstances warranting a departure from this rule. *Regina v. Commissioners of Sewers St. John*, 1 *Han.* 3.

#### **12—Affidavit—Entitling of.**

Irregular if entitled in a cause in moving for a rule nisi—discharged without costs. *See Regina v. Justices of York*, 1 *All.* 90.

#### **13—Return to—Mayor—Reasons, for refusing to swear party—Insufficiency of.**

The Mayor of Fredericton is merely a ministerial officer, and has no judicial functions to authorise him to refuse to swear in an alderman elect on the ground of disqualification, if properly returned by the presiding officer.

*Semble*, That an information in nature of a *quo warranto* might lie to try the right of a person to exercise the office ; but it would be an insufficient return to a mandamus to the mayor to swear in a person returned as duly elected by the proper officer—to say that he was not duly elected. *Ex parte Richards*. 2 *Han.* 131.

#### **Trying right to exercise office.**

*See quo warranto.*

#### **Second Application.**

*See Practice V.* 17.

#### **14—Other remedy — Mandamus refused — Justice of Peace.**

Where a Magistrate commenced the examination of a criminal charge, but refused to proceed because he thought that the only witness offered to prove a material fact, was not competent ; the Court refused, on the application of a private prosecutor, to grant a mandamus to compel him to proceed, there being another remedy by bill of indictment before the Grand Jury. *Reg. v. Duwaney*, 1 *Han.* 571.

**15—Remedy on Covenant—Not repairing bridge.**

The St. John Water Co., (incorporated by Act 2 Wm. IV. cap. 26,) covenanted with C. to build a bridge over certain overflowage on his land, caused by their works and to keep the same in repair while they continued to overflow his land. All the rights of the Company were afterwards vested in Commissioners, by Act 18 Vic. cap. 98, subject to the outstanding liabilities, and saving to every person all rights and remedies by reason of any contract or agreement theretofore made. *Held*, That C. had a legal remedy by action on the covenant, for not repairing the bridge, and therefore that a mandamus would not lie against the Commissioners to compel them to repair it. *Reg. v. Sears*, 6 *Al.* 68.

**C. MISCELLANEOUS.****16—Railway Company—Compelling Company to run daily trains -- Construction of Act — Remedy by Action.**

By the Act 36 vic. cap. 37, sec. 13, the New Brunswick and Canada Railway Co. are required "to provide and run all trains necessary for the carrying of passengers and freight," and to "run at least one daily train each way over the said main line and branches, (Sundays excepted,) unless prevented by weather, accident or some other unavoidable cause, other than from want of Railway Stock, or from keeping the road or its appliances in good running order." *Held*, That the fact that there was no profit derived from running a daily train between St. Andrews and Watt Junction, (one of the branches of the road,) was not one of the "unavoidable causes" that would justify the Company in not running a daily train. Railway Acts, and those of that description which are obtained on the application of their promoters are treated as contracts between the incorporators and the public. The language of the Acts is therefore considered as the language of the promoters, and where doubts arise as to the construction of that language, the benefit of the doubt is to be given to those who might be prejudiced by the exercise of the powers given by the Act.

Where the remedy by action is not so efficacious as

that by mandamus, the right of the latter is not taken away. *Re New Brunswick & Canada Railway Co. Ex parte Attorney General*, 1 P. & B. 667.

**17—Municipal aid to Railway Company—No authority to take Stock—Ultra vires.**

A municipality authorized by the Legislature to take Stock in a Company incorporated for the construction of a line of railway particularly defined by the Act, is not bound to issue debentures to a Company not incorporated to construct that specific line, and not being such a line of railway as the municipality is authorised to take Stock in by the Act 34 vic. cap. 44, the appointment of a director by the County Council and the subscription of the Stock list by the Warden is of no avail, and being in excess of their powers they would have no right to assess for payment of interest on debentures nor for payment of principal. *Ex parte The New Brunswick Railway Co.*, 2 Pug. 78.

**18—Compelling Assessment—School trustees.**

Where the trustees of a school district refused to pay a payment had against them in their corporate capacity, and did not assess their district to satisfy the judgment, a writ of mandamus was granted to compel the assessment. *Ex parte Devoe*, 1 P. & B. 513.

**19—Parish Officers.**

Session bound to confirm election of Parish Officers.  
*See Election.*

**20—Parish Officers—Election of—Sessions bound to confirm.**

Where a list of the Parish Officers elected at the Parish meeting has been properly certified by the chairman and attested by the clerk, the sessions are bound to confirm the election unless some irregularity is shewn in the election. *Ex parte Robinson, et al*, 1 Pug. 321.

**21—Private Corporation—Registry of Stock.**

The court will not grant a mandamus to a private corporation to compel them to register a transfer of stock in their books. *Ex parte Watson*, 3 Pug. 600.

**MANSLAUGHTER.**

*See Criminal Law.*

**MANURE.**

**Not incident to land conveyed—Conversion of**

*See Trover 15.*

**MARKET.**

*See By-Law 8—Power to establish Market—Corporation 14—Fredericton (City of).*

**MARRIAGE.**

**Performance of by Commissioner.**

*See Evidence VI. 3.*

**Solemnising of—Party under age—Penalty.**

*See Justice of Peace IV. 32. Regina v. Gallant.*

**Breach of promise of**

*See Evidence III. 29. Burke & Scribner.*

**Averment of—Action for mesne profits.**

*See Ejectment VI. 2.*

**Proof of marriage.**

*See Evidence VI. 4.*

**MARRIED WOMAN.**

*See Husband and Wife.*

**Legacy to—Action after decease of.**

*See Action at Law IX. 13.*

**Coverture ceasing—Infant—Right of entry.**

*See Partition.*

**Parol gift of land to wife—Title.**

*See Limitations (Stat. of) IV. 16.*

**Application by married woman to set aside proceedings in suit against husband.**

*See Practise VI. 56. Burchell v. Poor.*

**MASTER AND SERVANT.****DISMISSAL FROM EMPLOYMENT.**

**1—Justification—Knowingly bearer of challenge.**

To have been knowingly the bearer of a challenge to fight a duel, is such an offence as will justify a merchant

in the immediate dismissal of a clerk from his employment. *Dolly v. Kinnear*, 1 Kerr 480.

**2—Engaging in other employment.**

Plaintiff was engaged by defendant for two years as clerk, and shortly afterwards entered into partnership with other parties for the purpose of carrying on the same kind of business as his employer. *Held*, That this was such a breach of duty as would justify his dismissal. *Tozer v. Hutchinson*, 1 Han. 540.

3———If another ground of dismissal existed, the defendant has a right to avail himself of it at the trial, though he was not aware of it at the time of dismissal. *Ibid*.

**Dismissal without sufficient cause—Right to immediate action—Damages.**

*See Damages* I. 15.

**4—Action for wages—Quantum meruit—Previous receipt.**

Upon the *quantum meruit* for three years' service as clerk and book keeper, the defence set up was that the plaintiff had taken goods from the defendant's store which he had not charged himself with in the books, that the defendant having discovered this, threatened to proceed criminally against the plaintiff, but the matter was arranged by the plaintiff's giving to the defendant a receipt in full of all demands, and the plaintiff's quitting the defendant's service. The plaintiff notwithstanding brought this action, and the case was left to the jury as to the value of the plaintiff's services, and the amount he had received. The jury having found a verdict for the plaintiff for £24, the Court refused to disturb it. *Deaver v. Bradley*, 2 Kerr 110.

**5—Master of vessel—Negligence.**

The registered owner of a vessel is not liable for the negligence of the master, unless he has been appointed by such owner, or is acting for him as his servant or agent in the navigation of the vessel. *Newbury v. Young*, 1 Pug. 148.



**Stage Driver—Presumption as to paying over passenger money.**

*See Assumpsit III. 44.*

**Action by Master for Servant's earnings from other parties during engagement.**

*See Assumpsit III. 15.*

**Negligence of Servant—Liability of Master.**

*See Carrier 7—Negligence.*

**Relation—Selling Lumber—Approval.**

*See Trespass III. 6.*

**Duty of Master towards workmen.**

*See Negligence 6. Craig v. Chisholm*

**6—Contract of hiring—Dismissal—Grounds of.**

Declaration set out contract of hiring from 9th April, 1874. The evidence was that plaintiff had been in defendant's employ for previous year, which commenced on the 9th April, 1873. On 10th April, 1874, plaintiff not having yet left defendant's employ, the latter told him to continue on as before. *Held*, That the contract for the second year would begin on the 9th April, and that there was no variance.

It is no part of an ordinary contract of hiring that the servant has not been guilty of misconduct in any previous employment, and he is not bound to disclose such misconduct in the absence of enquiries made of him by the employer, and unless the servant has made some false representation, the discovery of such misconduct is no ground of dismissal. *Grove v. Domville*, 1 P. & B. 48.

#### **MASTER IN CHANCERY.**

**Deed from—Evidence of proceedings rightly done.**

*See Deed I. 17.*

**Purchaser under—Recovery in trespass.**

*See Trespass I. 11.*

#### **MATRAMONIAL CAUSES.**

**Court for trial of.**

The Court for the trial of Matrimonial Causes at the passing of the Act 23 Vic. cap. 37, consisted of a Judge of

the Supreme Court as Vice-president, and two members of the Executive Council. *Ex parte Chase*, 6 *All.* 394.

By the Act 4 Wm. IV., cap. 30, all the members of the Executive Council were *ex-officio* Judges of the Court. *Ibid.*

An order for Alimony was made by the Vice-president of the Court and two members of the Council. *Held*, That process of contempt for disobedience of the order might be made by a Court consisting of the Vice-president and two other members of Council. *Ibid.*

#### MAYOR.

**A ministerial officer.**

*See* Mandamus 13—Justice of the Peace—Corporation—Fredericton (City of).

#### MEDICAL ACT.

*See* Pleading I. 56.

#### MEMORIAL.

**Evidence of incumbrance on land—Binding land.**

*See* Lien 5—Evidence II. 33—Execution I. 2.

#### MERCHANTS SHIPPING ACT.

*See* Shipping Law.

#### MERGER.

**Of accounts between parties.**

*See* Assumpsit III. 50.

**Judgment obtained—Original cause of action merged in.**

*See* Set off 9.

**Judgment changes nature of debt.**

*See* do.

**Tenancy at will—Life estate.**

*See* Ejectment II. 2.

#### MESNE PROFITS.

*See* Ejectment VI.

#### MERITS.

**Setting aside judgment on affidavit of merits.**

*See* Judgment by Default.

**MILEAGE.**

*See Costs II. 82, 83.*

**MILITIA.**

*See Alien.*

**MILL DAM.**

*See Dam—Action on the Case—Covenant—Damages I. 2, 3, 4—Limitations of Actions—Water Course.*

**Mortgagor and Mortgagee—Non-liability of Mortgagee for erection of Dam.**

*See Action on the Case III. 2.*

**Use of Dam—Question left to Jury.**

*See Action on the Case III. 3.*

**Sluice-way—Municipality.**

The power given to the Sessions by 1 Rev. Stat. cap. 63, to order sluice-ways to be made in dams, is vested in the municipalities in incorporated counties by cap. 45. *Quære*, Whether it is necessary to prove any of the proceedings prior to the order of the municipality to construct a sluice-way. *McLean v. Davis*, 6 *All.* 266.

**MINES AND MINERALS.**

*See Crown Grant III. 1, 2.*

**License to dig.**

*See License—Pleading II. 18.*

**MINISTERIAL OFFICER.**

**Mayor.**

*See Mandamus 18.*

**Justice of the Peace—Official Act.**

*See Action at Law XI. 6.*

**MISDESCRIPTION.**

*See Bills and Notes IV. 8, VI. 10.*

**MISFEASANCE.**

*See Bailment.*

**MISJOINDER.**

Neither want of parties nor misjoinder is a ground of demurrer under the Equity Act 17 Vic. cap. 18, sections 8 and 24 Consol, Stat. cap. 49. *See Practice in Equity 37.*

**Of parties in Equity.**

*See* Appeal 12.

**Of Counts in declaration.**

*See* Pleading IV. 11.

**Of Causes of action.**

*See* Action at Law XII.

**MISNOMER.**

*See* Identity—Name—Initials.

**No ground of non-suit.**

Misnomer of plaintiff is not a ground of non-suit, if it be shown that defendant has not been deceived, and knows the action was brought by the person who actually sues, and that in such case an amendment is not necessary. *Per* Wetmore, J—*Copp v. Read*, 3 *Pug.* 527.

A defendant may be sued under a name he is commonly known by, though it is not his proper name. *Davidson v. King*, 2 *Pug.* 5.

**MISTAKE.****Omission in list of Debts.**

*See* Evidence VI. 7.

**Mistake in Statute.**

*See* New Trial III. 55.

**Witness giving evidence.**

*See* New Trial II. 11, 12.

**Claim in Replevin.**

*See* Replevin 21.

**Revised Statutes.**

The power given to correct mistakes in the arrangement of titles, etc., of Revised Statutes, ceases when the text of the Act is printed. *See* *Reg. v. McLaughlin*, 3 *Ad.* 159.

**Mistake in name.**

*See* Name.

**Mistake in running lines.**

*See* Crown Grant I. 11.

**MIXTURE OF GOODS.**

*See* Replevin 20 ; Trover 26.

**MONCTON.**

*See* Justice of Peace IV. 10—Election 2.

**MONEY LENT.**

*See* Assumpsit III. 41.

**Money paid into Court on appeal—Refunding of.**

*See* Appeal 21.

**MONTHS.**

A policy of insurance is a mercantile instrument, therefore the term "months" used therein, limiting the time for bringing an action for loss, means calendar months. *Pomares v. Provincial Insurance Co., Hill. T. 1873. See Insurance 40.*

**MORTGAGE—MORTGAGOR AND MORTGAGEE.**

*See* Equitable Mortgage.

**1—Extent of Contract—Confined to absolute estate.**

A. by deed reciting that he was seized of lands and hereditaments in fee simple, and being indebted to B. had agreed to transfer and convey to him the hereditaments thereafter mentioned for securing the debt ; *granted, bargained, sold, released and confirmed* to B. all the lands, &c., and hereditaments situate in the Province of New Brunswick, of which A. was seized in fee, or any other estate of freehold or inheritance. *Held*, That the deed was confined to absolute estates, and that as there was no assignment of debts, land which A. was entitled to as mortgagee did not pass. *Doe dem. Holderness v. Donnelly, 3 Kerr 238.*

**2—Accessory to debt.**

In ejectment, to recover certain premises which had been mortgaged to J. K. and H. G. K. for securing a bond debt, a deed of assignment was put in evidence from J. K. and H. G. K. to the lessors of the plaintiff, creditors of J. K. and H. G. K., and trustees for all the creditors, reciting among other things "that the assignors proposed to assign all their joint and separate estate and effects, real and personal, except as thereafter excepted," and, after designat-

ing certain real and personal estate, assigned all and singular (certain property named in the deed,) and also "debt and debts, sum and sums of money, bonds, bills, notes, securities, vouchers for or affecting the payment of money," and all the estate and effects of whatever nature and kind soever, etc., wearing apparel excepted; upon motion to enter a nonsuit on the ground that the deed of assignment having described other real estate, but omitted to describe or allude to the mortgaged premises, the same were not assigned by the deed. *Held*, That as the deed expressly mentioned debts, bonds and securities for money, the bond debt which the mortgage was given to secure passed to the lessors, and carried with it as accessory thereto the land contained in the mortgage. *Doe dem. Burnham v. Watts*, 3 Kerr 346.

### **3—Present legal estate—Mortgage debt.**

The plaintiff in ejectment claimed under a deed containing the following exception: "subject to an incumbrance of a certain mortgage now in possession and in favor of H." (the defendant.) *Held*, That these words did not necessarily show that a present legal estate in possession did not pass to the plaintiff by the deed, or that the mortgage referred to, gave the defendant an immediate estate in possession, which he was entitled to set up to bar the plaintiff's claim. *Doe v. Hanson*, 3 All. 427.

An executor cannot assign the legal estate in land mortgaged in fee to his testator, unless the land is devised to him. Without such devise, his assignment will only operate as a transfer of the mortgage debt. *Ibid*.

### **4—Liability of whole land to mortgage—Verbal agreement—Subsequent partition—Privity—Fraud.**

A., the father, and B. and C., his sons, being joint owners of two lots of land, mortgaged them to the plaintiff. A. afterwards conveyed to the plaintiff land of which he was sole owner, in payment of half the mortgage debt, and then released all his interest in the mortgaged lands to B. and C., who occupied the land in common for several years, and made several joint payments to the mortgagee

on account of the mortgage debt. B. and C. afterwards divided the land equally between them by deed of partition. In a suit for foreclosure of the mortgage, B. claimed that as between himself and C. his portion of the land had been released by the mortgage at the time A. conveyed the land to him, and that C.'s lot should be first sold to satisfy the mortgage. *Held*—1st. That in the absence of any written agreement by the mortgagee, the whole of the land remained equally liable to the mortgage, and should be sold in one lot. 2nd. That if a verbal agreement, and the appropriation of the payment by A., would be sufficient to release a particular part of the mortgaged lands, it would not bind C. who was no party to it. 3rd. That the subsequent partition of the land between B. and C., in ignorance by the latter of the agreement, by which the portion of the land allotted to B. was to be released from the mortgage, was a fraud upon C., and that such agreement would not be carried out for B.'s benefit. *Johnston v. McCartney and others*, 1 *Han.* 220.

#### **5 — Operation of mortgage — No notice — Rents and profits—Grass.**

Where the mortgagee has not given any notice of intention to take the rents and profits of land in possession of the mortgagor, grass growing on the land will be deemed to be the property of the mortgagor, with the assent of the mortgagee. *Barter v. Johnson*, 5 *All.* 350.

#### **6—Deed absolute in form—Mortgage.**

A deed absolute in form decreed to be only a mortgage on satisfactory evidence that such was the intention, and a subsequent deed from the grantor to a third person with notice of the prior deed, though registered first decreed to stand subordinate thereto, and the grantee in the second deed allowed to redeem the mortgage. In default of doing so, his deed declared fraudulent and void, as against the first deed. *Hillock v. Frizzle*, 5 *All.* 655.

#### **7—Enrolment of Registry—Proviso for redemption.**

The estate of a mortgage in fee of land, cannot pass by deed of bargain and sale without enrolment or registry, nor

by feoffment without livery or seisin. *Doe dem. Burnham v. Watts*, 2 Kerr 441.

The proviso for redemption will not operate as a redemise to the mortgagor so as to entitle him to the possession of the land until default made, unless there be a stipulation to that effect. *Ibid.*

**8—Failure of condition—Ejectment—Notice.**

Where a mortgage deed is given to secure the payment of a certain annual sum on a particular day, and the deed contained a clause that until default the mortgagor may continue in possession. *Held*, That if the annuity is not paid on the day stipulated the mortgagee may eject the mortgagor without notice to quit or demand of possession. *Doe dem. Bryant v. Cunard*, 2 Kerr 198.

**9—Defence—Mortgagee—Assignee—Statute of Limitations.**

Assignee of mortgagee in possession may set up the mortgage as a defence to an action of ejectment by the assignee of the equity of redemption, though the mortgage is more than twenty years old, and the right to recover thereon is barred by the Statute of Limitations. *See Doe v. Hanson*, 3 All. 427.

**10—Statute of Limitations—Payment by mortgagor—Sale of Equity of Redemption.**

S. mortgaged land to the lessor of the plaintiff in 1837 and made payment on account from time to time, the last payment being in October 1843. In 1842 the equity of redemption of S. was sold at Sheriff's sale by a judgment creditor, and the defendants claimed under the purchaser. *Held*, That notwithstanding the sale of the equity of redemption the payment by S. kept the mortgage alive for twenty years from the time of that payment, by 1 Rev. Stat. cap. 189, sec. 30, and that the mortgagee could recover the possession. [*See Chinnery v. Evans*, 10 Jur. N. S. 855.] *Doe dem. Fox v. Wright*, 6 All. 241.

**11—Possession by verbal permission of mortgagee.**

A person who goes into the possession of land by the



verbal permission of the mortgagee, cannot be put out of possession by the mortgagor, or any one claiming under him. *Doe dem. Harding v. Hanson*, 6 All. 340.

**12—Entry by command of mortgagee—Defence.**

A verbal command by a mortgagee to a third person, to enter on land in possession of the mortgagor, and cut and carry away timber, is a defence to an action of trespass by the mortgagor against such person. *Carson v. Griffin*, 6 All. 244.

**13—Several mortgages—Power of sale—Assignments—Discharge on records—Claim on payment.**

M. gave three several mortgages to A., B. and C. The mortgage to C. contained a power of sale to him and his assigns in default of payment of the amount due on his mortgage; or, in case he or his assigns should pay any part of the moneys payable on the mortgages to A. and B. respectively. C. paid off B.'s mortgage, satisfaction of which was entered on the records,—and the mortgages of A. and C. were afterwards assigned to the defendant. *Held*, That by the assignment, the power of sale given to C. in the event of his paying B.'s mortgage, vested in the defendants, and was not affected by the discharge on the records; and that in a suit to redeem, the defendants were entitled to claim the amount paid by C. to discharge B.'s mortgage, though that mortgage had not been assigned to them. *Livingston v. Bank of New Brunswick*, 6 All. 252.

**14—Excessive claim—Payment—Interest allowed.**

In order to prevent the exercise of a power of sale by the mortgagee, the mortgagor paid the amount claimed, under protest: in a suit for redemption of the mortgage the amount claimed by the mortgagee having been held excessive, the mortgagor was allowed interest on the excess. *Ibid*.

**15—Estate of mortgagee—Execution against.**

The estate of a mortgagee in fee who has not taken possession of the land, is not seizable in execution on a judgment against him. *See* Execution I. 3.

**16—Mortgagor and Mortgagee.**

Non-application of Act 6 Wm. IV., cap. 43, sec. 2. *See* Limitations of Actions I. 6 a.

**17—Extinguishment of debt—Purchase.**

If the mortgagee purchases the equity of redemption at Sheriff's sale, the mortgage debt is extinguished. *McPhelim v. Weldon*, Trin. T. 1862. *In re Beckwith*, M. Rolls, August, 1845, 5 All. 358.

**18—Erection of Mill Dam by Mortgagor—Liability of Mortgagee.**

*See* Action on the Case III. 2.

**19—** Mortgage paid but not cancelled,—mortgagee has no beneficial interest in the property. *Doe v. Baxter*, 2 All. 377.

**20—Evidence—Executor.**

An assignment of a mortgage by an executor is not admissible in evidence without proof of probate. *Doe v. Sanson*, 3 All. 427.

**21—Disputing title of mortgagor.**

After foreclosure, a stranger to a mortgage may dispute the title with the mortgagor. *Doe v. Brown*, 3 All. 439.

**22—Insurance.**

A mortgagor has a right to insure to the value of his property, without disclosing the incumbrance, unless stipulation in policy to the contrary. *See* Insurance 25.

**23—Mortgage — Fraudulent or not — Sufficiency of—Consideration.**

The plaintiff claimed title under a mortgage from P., stating as consideration a debt of £300—but there was no proof of any debt beyond £25; the defendant claimed under a Sheriff's deed founded on a judgment recovered against P. since the mortgage, and gave evidence to shew that the mortgage was fraudulent. The Jury were directed that if there was a debt from P. and the mortgage was given *bona fide* for the purpose of securing it, it would be valid. *Held*, That this direction was right, and that it was not enough to shew a consideration to the extent of £25. *Doe v. Gilbert*, 1 All. 520.

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### **24—Extinguishment—Taking note of third party.**

The taking by a mortgagee of the note of a third party is not of itself an extinguishment of the mortgage debt. *Cotton v. Stack*, 3 *Pug.* 424.

### **Resulting Trust—Deed given to operate as mortgage—Right to reconveyance.**

*See Trust. Sutherland v. Meekan.*

### **Construction of Statute—Mortgage given in Maine to secure debt for money lent on betting on horse-race.**

*See Statute 6. Bailey v. McDuffee.*

### **25—Declaration—Description of mortgagors.**

A mortgagor in possession of property, is properly described in the declaration as being "seized and possessed" thereof. *Brewing v. Berryman*, 2 *Pug.* 515.

### **Mortgage right—Equitable claim.**

*See Equity 8.*

### **Foreclosure.**

*See Equity—Practise in.*

### **Liability of land mortgaged.**

*See Equity 12.*

### **Surrender by lessee of interest in lease to landlord.**

*See Landlord and Tenant I. 3.*

### **Outstanding mortgage—Answer to plea of property in replevin.**

*See Replevin 5.*

### **Defence by Tenant—Mortgage by Landlord.**

*See Landlord and Tenant V. 22.*

### **Title under Mortgagee.**

*See Ejectment II. 6.*

### **Contesting Mortgage Title of Lessor in Ejectment.**

*See Estoppel I. 22.*

### **Corporation—Validity of Deed to.**

*See Corporation.*

### **Trespass—Disputed Mortgage Title.**

*See Trespass II. 7.*

**Estoppel—Action against Mortgagor by purchaser of Equity of Redemption.**

*See Estoppel I. 12.*

**Mortgagee against Mortgagor.**

*See Estoppel I. 18.*

**Assent of Plaintiffs to mortgage of personal property.**

*See Estoppel I. 16.*

**Asportavit—Purchaser of Deed from Master in Chancery.**

*See Trespass I. 11.*

**Registry—Notice.**

The registry of a mortgage is not notice of an incumbrance to subsequent purchaser. *Doe v. Power*, 1 *All.* 271.

**Purchaser of Ship—Notice of prior unregistered mortgage—Injunction to restrain sale.**

*See Shipping Law 8.*

**Plaintiffs right to costs of defending suit for redemption.**

*See Costs 119.*

**Payment of rent to mortgagors in possession—Tenancy.**

*See Frauds, (Statute of.) 5.*

**As to right of devisee of mortgaged property to have mortgage paid out of personal estate.**

*See Will.*

**Absolute conveyance—Mortgage form—Claim.**

*See Equity of Redemption. Sutherland v. Meehan.*

## MOTHER.

*See Heir at Law.*

## MOTION PAPER.

*See Practice V.*

## MULTIFARIOUSNESS IN BILL.

*See Practice in Equity.*

## MUNICIPALITY.

*See Mandamus.*

**MUTUALITY.**

**Agreement to refer signed by one party, whether bad for want of mutuality.**

*See Therrian v. Therrian 4 All. 48.*

**Deed bad for want of mutuality.**

*See Deed.*

**NAME.**

*See Identity—Misnomer.*

**False Imprisonment—Not shewn that plaintiff known by one name as well as another.**

*See Pleading II. 20.*

**Judgment—Averment of same person.**

*See Pleading I. 58.*

**Identity of person.**

*See Pleading I. 57.*

**Affidavit—Certainty as to name.**

*See Affidavit III. 5.*

**Judgment—Nova Scotia.**

Whether further evidence than mere identity of name was not necessary to identify the defendant with the defendant in the judgment sued on. *See Evidence II. 29.*

**Corporate name—Sufficiency.**

*See Corporate Name.*

**Replevin—Claim by wrong name—Assignment of bond in right name.**

*See Replevin 21.*

**Parties—Same name—Surveyors—Question left to jury to find who was intended.**

*See Identity.*

**Affidavit for attachment — Necessity of setting out one of defendant's Christian names.**

*See Affidavit III. 8. McLelland v. Milmore.*

**Acknowledgment of Deed—Initials.**

*See Deed I. 45. Briggs v. McBride.*

**Grantor described by initials.**

*See* Deed. *Ibid.*

**Initials.**

Where plaintiff is described in a writ by the initial letter of his christian name, the defendant's proper remedy is apply to a Judge to compel him to amend, and the writ will not be set aside for irregularity on this ground.

*Semble*, That a consonant may be the christian name of a party. *Macmonagle v. Grant*, 3 *Pug.* 281.

**Naturalization.**

*See* Alien.

**NAVIGABLE RIVER.**

**Obstructing approach to wharf in navigable river.**

*See* Action on the Case IV. 3.

**Trespass—Cutting Nets—Damages.**

*See* Damages I. 27.

**Fishery.**

The right of fishing in a public navigable river belongs to the public, and not to the owners of land bounded on the river. *Rose v. Belyea*, 1 *Han.* 109.

**Common highway—Obstructing navigation of—Damage.**

*See* Action on the Case IV. 1, 2.

**NAVIGATION.**

Injuring plaintiff's nets.

**Allegation of cause of injury.**

*See* Action on the Case II.

**Obstructing river.**

*See* Boom Co.

**NEGLIGENCE.**

*See* Action on the Case.

**Attorney negligently conducting action—Pleading.**

*See* Pleading II. 22. *See* Attorney VII. 3.

**Surgeon—Negligence—Declaration.**

*See* Action on the Case II. 3. *See* Evidence III. 10.

**Penalty—Negligently kindling fire.**

*See Fires.*

**Water company—Damage by fire—Duty as to keeping supply of water.**

*See Water Company.*

**Escape.**

*See Sheriff.*

**Fire—Negligence of tenant.**

*See Action on the Case I. 2.*

**Owner and master of steamboat—Collision—Damage.**

*See Principal and Agent 16.*

**Negligence of servants.**

*See Carrier 7.*

**Using improper gear.**

*See Carrier 8.*

**Negligence of master of ship.**

*See Shipping Law.*

**Municipal corporation liable for negligence in discharge of duty imposed on them by their charter.**

*See Corporation 18.*

**1—Contributory negligence.**

In an action for running down a vessel, if there was negligence on both sides, and the plaintiff, by his own negligence, has contributed to the injury sustained by his vessel, he cannot recover. *Day v. Hatheway*, 5 *All.* 388.

**2—Question not raised at trial.**

If in an action for running down a vessel, the defendant did not raise any question of contributory negligence on the part of the plaintiff, and the case went to the jury on the points taken by the defendant's counsel, he cannot object, on a motion for a new trial, that the Judge should have left the question of contributory negligence to the jury. *Marvin v. Butterwell*, *Trin. T.* 1867.

**3—Legal right—Obligation.**

The defendants, having authority by law to lay out and open streets in the City of St. John, laid out a street through

an unenclosed and hilly piece of ground. Several houses were built on the line of this street, but the land in the vicinity remained unenclosed, and people were accustomed to pass over it as they pleased, in various directions, though there was no right of way, except by the street. The defendants, having determined to level and improve the street, made cuttings through the hill for that purpose—several feet deep in some places. The plaintiff had formerly lived in the neighbourhood of the street, and had been in the habit of crossing the open space; and after the street was levelled, she was crossing the open space in the night, and not being aware of the cutting, fell into the street and was injured. *Held*, per Allen, J. (Fisher, J., *contra*), That the plaintiff had no legal right, as against the defendants, to cross over the land; that there was therefore no legal obligation on the defendants to light the street, or to fence the sides of it against persons using the adjoining lands; and therefore they were not liable for the plaintiff's injury.

*Henderson v. The Mayor, &c. of Saint John*, 1 *Pug.* 72.

#### 4—Killing cattle—Railway Train—Evidence.

In an action against a Railway Company for running over and killing cattle on the track, the evidence of negligence relied on, was that at the time the cattle were killed, the train was being run with the engine behind, which was alleged to be less safe than running in the ordinary way, with the engine at the head of the train: it appeared, however, that the train was not a long one; that a man was stationed on the front car to look out for obstructions on the road, and to signal to the engine driver; that the train was going round a curve at the time, at a slow rate of speed; that every precaution was taken to prevent accidents; and that the train was stopped as soon as it could have been if the engine had been in front. *Held*, That there was not sufficient evidence of negligence to leave to the jury. *Falconer v. European and North American Railway Company*. 1 *Pug.* 109.

The fact that an accident has occurred, is not of itself evidence of negligence: the plaintiff must give affirmative



evidence of negligence on the part of the Railway Company, and if the fact of negligence is left doubtful, the defendants are entitled to a verdict. *Ibid.*

**5—Boom breaking—Obligation.**

By Act 10 Vic Cap. 72, amended by 11 Vic. cap. 49, and 16 Vic. cap. 52, the South Bay Boom Company was authorised to erect piers and a boom between certain points on the River St. John, for the purpose of securing timber and lumber brought within the boom or fastened on the outside thereof. *Held*, that though the Company had the general control and direction of all lumber within the boom, it was under the immediate charge of the owners thereof; and therefore the Company was not liable to a proprietor of land within the limits of the boom, for damage done by lumber in the boom breaking adrift, and floating upon his land—there being no duty imposed upon the Company, by the Acts, to prevent lumber deposited in the boom, from drifting on the adjoining shores: and no evidence of negligence on the part of the Company, or, of their omitting to use all proper precautions in the erection of their piers and booms. *Dever v. South Bay Boom Company*, 1 *Pug.* 109.

**6—Master and servant—Fellow servant—Liability.**

An agent or servant is not liable for injuries caused by the negligence of a fellow servant, though such fellow servant was employed by him as agent for another, and was under his authority and control, it not appearing that the injury was caused by an obedience to the direct and express orders of the defendant. *Craig v. Chisholm*; *Nevin v. Chisholm*, 1 *P. & B.* 218.

**7—Government Railway—Contractors.**

The contractors engaged in the construction of a Government railway are not liable under the 81st Vic. cap. 68, sec. 11, (Canada Act) for damages caused by a non-compliance with the provisions of the said section. *Ibid.*

**8—Defective materials in work—Injury caused therefrom—Knowledge of defendant.**

A master is bound to take proper and reasonable pre-

cautions for the safety of his workmen. Therefore, where declaration alleged, 1st. That plaintiff was retained by defendant to work on construction of a ship on a scaffolding in defendant's shipyard, and defendant took so little care in furnishing materials, that he wholly failed to provide adequate materials, and negligently permitted said scaffolding to be erected of improper materials, so that it gave way while plaintiff was working on it, and he was injured; and, 2nd. That defendant took so little care in the selection and employment of a foreman, that by reason of his negligence he employed one F., an unfit person to superintend erection of said scaffolding, so that by reason of defendant's negligence and F.'s unfitness, and neglect of defendant's duty in that behalf, said scaffolding fell, whereby plaintiff was injured. *Held*, Sufficient on demurrer, and that it was not necessary to charge expressly that defendant had knowledge of the defective materials or the incompetency of the foreman. *McDonald v. McFee*, 8 *Pug.* 159.

**Duty of Chief Engineer of Fire Department—Res-  
pondent superior.**

*See* Action on the Case II. *Harris v. Master.*

**Repairing public street in St. John—Allegation—Evid-  
ence of street being under contract of Corpora-  
tion.**

*See* Pleading I. 75. *Gordon v. Mayor, &c., St. John.*

**Improper use of hooks in lowering casks.**

*See* Carrier 8. *Street v. Morrison.*

**Negligence of servants of carrier.**

*See* Carrier. *Ibid.*

**Loss of goods—Delivery not complete.**

*See* Carrier 6.

## NEW ASSIGNMENT.

**Assault.**

*See* Pleading I. 12.

**License.**

*See* Pleading II. 17.

**Setsin.**

*See* Pleading II. 18.

**NEW ENQUIRY.**

*See* Practice VIII.

**NEW MATTER.**

**Leave to file affidavits in answer to.**

*See* Affidavit VI. 8.

**NEWSPAPER.**

**Publication in—Presumption.**

*See* Joint Stock Company 3.

**Publication of notice for three consecutive days.**

*See* Costs 84 b.

**Notice in.**

*See* License 11.

**NEW TRIAL.**

I. MOTION—AFFIDAVITS—PRACTICE.

II. FOR WHAT CAUSE GRANTED—SUFFICIENCY.

III. REFUSAL—INSUFFICIENCY OF REASON.

IV. MISCELLANEOUS.

**I.****MOTION—AFFIDAVITS—PRACTICE.****1—Issue sent down by equity side of Court.**

When an issue is sent down for trial by the equity side of the Court under 17 Vic. cap. 18, sec. 18, 2 Rev. Stat., page 80, a motion for a new trial must be made before a Judge in equity. *Hodge v. Reid*, 1 *Han.* 89.

**2—Notice.**

Notice of an intended motion for a new trial, must be given to the Judge who tried the cause, though points have been reserved at the trial. *Flaherty v. Sayre*, *Ber.* 88.

**3—York Sittings.**

Under the rule of Court, Mich. 1 Vic., thirty days' notice must be given of a motion for a new trial from the York Sittings, although points have been reserved at the trial. *Turner v. Hammond*, 2 *Kerr* 586.

**4—Affidavits—Jurors—Witnesses—Party.**

Affidavits of jurors stating that they have received evidence after retiring from the bar, cannot be received to impeach their verdict and obtain a new trial. *Attorney General v. Boyer*, C. Ms. 78. See *Infra* II. 41-43.

5—On a motion for a new trial, an affidavit stating that one of the jurymen had informed the deponent that the verdict was decided by lot, will not be received. *Hodgson v. Carr*, 3 *Kerr* 499.

6—The Court refused to receive affidavits of the jurors stating that they found the defendant was not in a proper state of mind to understand the deed, and intended to assign that as the reason for their verdict. *Babbitt v. Couperthwaite*, 8 *All.* 373.

**7—Witnesses—Affidavits—Discovery of new evidence.**

To support an application for a new trial in consequence of the discovery of new evidence, the affidavits of the witnesses should be produced; or if they refuse to make affidavits, the applicant should state what they can prove. *Coy v. Gardiner*, 2 *All.* 91.

**8—Discovery of new evidence.**

In applying for a new trial in consequence of the discovery of new evidence, it should appear that the evidence was unknown to all the defendants at the former trial. *Smith v. Neill*, 4 *All.* 105.

**9—Entry on Judge's notes.**

Where a new trial is to be moved for on the ground of improper reception of evidence, counsel should take care that the question is correctly entered on the Judge's notes. *Brown v. Taylor*, *Ber.* 343,

**10—Question not raised at trial.**

If in an action for running down a vessel, the defendant did not raise any question of contributory negligence on the part of the plaintiff, and the case went to the jury on the points taken by the defendant's counsel, he cannot object, on a motion for a new trial, that the Judge should have left the question of contributory negligence to the jury. *Marvin v. Butterwell*, *Trin. T.* 1867

**11—Ejectment—Verdict for defendant.**

As a general rule, a new trial will not be granted in ejectment where the verdict is for the defendant. *Doe dem. Edgett v. Downey*, 1 *Pug.* 321.

**12—Defendant's death—Imposing Terms.**

Where the defendant died after a rule *nisi* for a new trial for improper admission of evidence had been granted on his application, the rule was made absolute on the following conditions: 1st. That the defendant's representatives should enter into an agreement that the verdict should stand as security for the result of the new trial, provided the plaintiff obtained the verdict. 2nd. That such verdict should be entered as of the assizes, when the cause was previously tried. 3rd. An undertaking that the defendant's death should not be assigned as error. 4th. That notice of trial should be served on the defendant's representatives and on the attorney on the record. (Weldon J., *dissentiente*—that a new trial was grantable *ex debito justiciæ* and therefore no terms could be imposed. *Key v. Thomson, East T.* 1871.

**Rule nisi—Remodelling of.**

See Practice VIII. 19.

**13—Day of moving for.**

After the first Saturday in the term, no motion for a new trial can be made, unless the cause has been mentioned in the Court on that day. *Orpwood v. Morrissey*, 1 *P. & B.* 3.

**14—Wilderness land—No title by document or otherwise but by possession, finding of Jury will not be interfered with.**

See Limitations of Actions IV. 15. *Estabrooks v. Brean*.

**15—Affidavit of Juror—Admissibility.**

*Semble*, Whether affidavit of a dissenting jurymen as to a conversation between himself and another jurymen is not admissible on motion for a new trial. *Burnet v. Smith*, 1 *P. & B.* 28.

## II.

## FOR WHAT CAUSE GRANTED—SUFFICIENCY.

**1—Wrong conclusion of jury.**

If the Court is satisfied that the jury have come to a wrong conclusion upon the evidence, a new trial will be granted, though it was a question involving the consideration of fraud, and was left to the jury on that ground, and on the credibility of a witness. *Doe v. Hatch*, 1 *All.* 200.

**2—Further investigation requisite.**

In an action of trespass involving a question of boundary, where the surveys made had not satisfactorily ascertained the bounds of a grant, and the case appeared to require further investigation, the Court granted a new trial on payment of costs. *Scribner v. McLaughlin*, 1 *All.* 379.

**3—Verdict against law and evidence.**

Where a verdict given for the defendant in an action of ejectment was clearly against law and evidence, the Court granted a new trial, the costs to abide the event of the suit. *Doe v. Watson*, 1 *All.* 675.

**4** ———The Court is very reluctant to send a cause down to a third trial; but will do so, on payment of costs, when the verdict is clearly against law and evidence. *Hartley v. Fisher*, 1 *All.* 694.

**5—Improper reception of evidence.**

Where evidence has been improperly received, a new trial will be granted, unless the court is satisfied that the jury were not influenced by the evidence. *McMillan v. Fraser*, 2 *All.* 615.

**6** ———Where evidence has been improperly received, a new trial will be granted; and the Court will not enter into an inquiry whether there is proof enough to support the verdict without the objectionable evidence. *Girvan v. Mayor of St. John*, 6 *All.* 411. See *Key v. Thomson*, 2 *Han.* 224.

**7—Improper reception of evidence—Possible influence on jury.**

Where a deed offered to shew the defendant's title to the land in dispute was improperly received in evidence, a

verdict for the defendant was set aside, though it might have been sustained without the deed; it not being clear that the jury were not influenced by it. *Maynes v. Dolan*, 3 All. 578.

**8—Absence of Counsel—Terms of rule.**

Where a cause was tried as undefended in the absence of the defendant's attorney, who was accidentally out of Court in expectation that the case which stood before it would occupy the whole day, the Court granted a rule *nisi* to set aside the verdict on payment of costs, and on condition that the defendant paid the amount of the verdict into Court; the plaintiff to be at liberty to consent to the rule being made absolute and to go trial at the first Circuit. *McLean v. McDonald*, Trin. T. 1864.

**9—Perverse verdict.**

Where the verdict is perverse, a new trial will be granted without argument of the questions involved in the case. (See *Hawkins v. Alder*, 18 C. B. 640.) *Allison v. Robinson*, Mich. T. 1871.

**10—Verdict—Point not submitted.**

Where the only question left to the jury was the mental capacity of the defendant to execute the deed on which the action was brought, and a verdict was given for the defendant, one of the jurors stating at the time that it was "from the defendant's not being fully acquainted with the contents of the deed," the Court granted a new trial; the defendant's ignorance of the contents not being sufficient to warrant the verdict, if he was competent to execute the deed. *Babbit v. Cowperthwaite*, 3 All. 973.

**11—Mistake of witness.**

A new trial may be granted in consequence of a mistake made by a witness in giving his evidence, but the practice must be exercised with much caution. No general rule can be laid down on the subject. *Doe v. Albee*, 3 All. 375.

**12—Mistake of witness—Immaterial as to result.**

It is no ground for a new trial, that a witness for the defendant made a mistake in giving his evidence as to the

contents of a letter, which mistake he wished to correct ; the Court being satisfied that the evidence as corrected together with that given by defendant would be no answer to the plaintiff's case. *McGee v. Wetmore*, 5 All. 230.

**13—Discovery of new evidence—Surprise.**

Plaintiff in ejectment relied on an adverse possession of fourteen years in A., her father, and possession in herself after his death in 1832, making together twenty years. The defendant held under a lease from the Corporation of Saint John, the grantees of the land. After a verdict for the plaintiff, the defendant's attorney in consequence of the evidence of one of the plaintiff's witnesses, searched the records and found a conveyance from A. of his interests in the lands to R. dated in 1821, describing it as " corporation ground ;" he also upon enquiry of B. (referred to by the plaintiff's witness), ascertained that B. had held the land under a lease from the Corporation of Saint John, which had since expired, and let A. in as his tenant in 1818, and that he held as such until his death. *Held* that this evidence was material, and there being no reason to suppose that the defendant was before aware of its existence, a new trial was granted on payment of costs. *Doe v. Baker*, 3 All. 591.

**14—Verdict inconsistent with evidence—Unless terms assented to, new trial granted.**

Where the damages in an action for goods sold and delivered, were inconsistent with any view of the evidence, a new trial ordered on payment of costs, unless the plaintiff consented to reduce the verdict to conform to the value of the goods as proved by the defendant's witness. *DeMill v. Foshay*, 4 All. 86.

**15—Variance—Description of property—Objection.**

Where the *Nisi Prius* record in an action of trespass varied from the declaration delivered, in the description of the property taken, and the plaintiff's counsel, in his opening, claimed for property of which the defendant had no previous knowledge, a verdict for the plaintiff was set aside, though the defendant's counsel had cross-examined



the plaintiff is reference to such property—the variance having been objected to at the opening of the case. *Brocheau v. Desbrisay*, 4 All. 122.

**16—Verdict against evidence.**

The defendants claimed title to certain premises under a deed sworn to have been made in 1815 or 1816, but never recorded, and alleged to have been destroyed. It was testified by a witness, whose evidence was somewhat shaken, that in 1815 or 1816 he purchased the premises from the grantee for £40, and gave one O. as security for the purchase money; that on paying the purchase he got a deed of the premises, which was witnessed by A. S., and that afterwards he made a deed of the same premises to G. and C., which deed was copied from the first mentioned deed; and this statement was confirmed by O. as to the bargain for the premises and payment of the purchase money; and by S., that he had been called on to witness such a deed; and by the deed to G. and C. which referred to the first deed; a verdict against such first deed was set aside as against evidence, and a new trial ordered. *McEachern v. Ferguson*, 3 Kerr 242.

**17**———A verdict against the weight of evidence, on a question of boundary, was set aside by the Court, a new trial granted, on payment of costs, though the cause had been tried by a special jury of view. *Lancaster v. Murray*, 3 Kerr 885.

**18—Verdict against evidence—Statute of Limitations defeating action.**

Where the verdict is against evidence in an action of ejectment, and the Statute of Limitations may defeat the plaintiff before he can bring a second action, the Court will grant a new trial. *Doe dem. Estabrooks v. Humphrey*, 1 Han. 104.

**19—Insufficient evidence—Verdict contrary to Judge's charge.**

Goods were levied upon under an execution, but not removed by the Sheriff, the defendant having paid the amount. In an action of trespass against the attorney

(the execution having been afterwards set aside for irregularity) the plaintiff gave no evidence that the goods were his property or in his possession at the time of the seizure, and the Judge directed the jury to find for the defendant, but they found a verdict for the plaintiff; the Court granted a new trial. *Wilson v. Street*, 3 All. 80.

**20—Misdirection of Judge.**

Where the Judge had misdirected the jury, the Court granted the plaintiff a new trial, though they were of opinion that his right was barred by the Statute of Limitations—that objection not having been taken on the trial, *Doe v. Baxter*, 3 All. 306.

**21—Judge's ruling on point of law—Influence on jury**

Where the jury found a question of fact for the plaintiff, although there was a clear preponderance of testimony on defendant's side, and the Court were of opinion that in consequence of the ruling of the Judge on a point of law, under which the plaintiff would recover in any case, the question of fact might have received less consideration than it was entitled to, a new trial was ordered. *Hoyt v. Stockton*, 2 Han. 60

**22—Insufficient evidence—Credit.**

In an action to recover the price of certain pictures and glass sold and delivered to the defendants, the defence set up to the demand for the glass, about £24, was that the purchase had been made on account of one J. W., but the only evidence to prove it, was that a clerk of the plaintiff, but without his privity, had at the defendant's request made out and rendered a bill charging J. W. with the amount; the jury having found a verdict for the plaintiff for £3 12s. 1d., the balance due on the pictures, excluding the price of the glass: the Court on his application granted a new trial on payment of costs. *McDermott v. Bell*, 2 Kerr 363.

**23—Precise point not submitted to jury.**

In an action by the assignee of a demand, sued in the name of the assignor, certain receipts and admission by the assignor were given in evidence to prove payment in

full to him by the defendant, which receipts and admissions however were accepted to be impeached as having been made in fraud of the assignee. *Held*, That the question for the jury was not whether payment had been made before or after the assignment of the demand, nor whether such payment was in fraud of the assignee; but simply, whether the payment had been actually made; and this precise point not having been submitted by the learned Judge to the jury, who found against the receipts and admissions, a new trial was awarded. *Goss v. Messinett*, 3 Kerr 201.

**24—Adverse declaration of juror not objected to.**

Where a party, against whom a verdict is rendered, is aware before the trial of a juror expressing a determination to give a verdict against him, and does not object to such juror on his being sworn, the Court will not disturb the verdict. *Scribner v. McLaughlin*, 1 All. 379.

**25—Compromise—Verdict, result of.**

Where the verdict for the plaintiff was evidently the result of compromise, and the weight of evidence was in favour of the defendant, the Court set it aside. *Keys v. Flynn*, Ber. 125.

**26—Evidence unsatisfactory.**

Where the evidence was multifarious and contradictory, producing no satisfactory result, the Court ordered a new trial on payment of costs. *Merithew v. Sisson*, 3 Kerr 373.

**27—Survey—Line doubtful upon the evidence.**

Where in trespass *q. c. fregit*, the case turned upon the true position of a dividing line between two grants, which line had not been ascertained by any proper survey, and was left doubtful upon the evidence; the Court set aside a verdict which had been rendered for the plaintiff, and granted a new trial on payment of costs. *Ball v. McCready*, 2 Kerr 228.

**28—Counsel—Witness.**

One of the defendants' counsel, after having been examined as a witness for them, addressed the jury on

their behalf, and a verdict was returned for the defendants ; on a rule *nisi* for a new trial, *Held*, That examining a party's counsel as a witness for him, was an improper practice, and accordingly the rule for a new trial was made absolute. *Shields v. McGrath. et. al.*, 3 Kerr 398.

**29—Jury—Tampering with by defendant.**

Where after the jury retired from the bar, the defendant conversed with them respecting the cause, and supplied them with victuals and drink, the verdict was set aside. *Trefethen v. Carman, Trin. T. 1831.*

**30—Jury receiving refreshments from defendant.**

The jury after viewing the land in dispute went to the house of one of the defendants and had refreshments ; no explanation of the charge was given by the jurors or the officer in charge of them. *Held*, per Ritchie, C. J., Allen and Weldon, J. J., That a verdict for the defendant ought to be set aside ; per Fisher and Wetmore, J. J., That the plaintiff being aware of the fact before the trial, should have applied to the Judge to discharge the jury ; and that the objection was too late after verdict. *McNeill v. Moore*, 1 *Pug.* 234. *See Infra* No. 44. *Ferguson v. Troop. See* III. 46. *Spence v. Trenholm.*

**31—Verdict contrary to evidence as to identity of land.**

A new trial was granted in ejectment where the verdict was found for the defendant, contrary to evidence, as to the identity of the land described in a lease to the defendant. *Doe dem. Sands v. Phillips*, 1 Kerr 533.

**32—Verdict inconsistent with evidence and not in accordance with Judge's charge.**

The jury having, upon the second trial of an action of trespass against the Sheriff for taking timber, found a verdict for the plaintiff for £200, the value of the timber being over £900, and having been directed to find for the plaintiff for the value of the timber as being his property, or for the defendant, as being D.'s property, under an execution against whom defendant had seized and sold the timber ; the Court, on the application of the plaintiff, set aside the verdict and granted a new trial on payment of costs. *Connell v. Miller*, 2 Kerr 116.

The circumstance that the amount of the verdict was about the same as had been paid by the plaintiff to relieve the timber from the claims of the Crown, etc., and that this sum must have been paid whether the plaintiff or D. was the true owner, was not considered sufficient to sustain the verdict, as this was not stated as the ground of the verdict, and was inconsistent with the position of either party. *Ibid.*

**33—Verdict not confined to proper damages.**

In trespass, where a boundary was the prominent question in dispute, and the plaintiff in addition to his evidence of the line which he sought to establish, and the trespasses committed within it, proved a trespass of cutting forty trees on his side of the line claimed by the defendant. The learned Judge, on the evidence of both sides, left the questions of the lines to the jury, telling them that the line proved by the defendant was the more correct one, but that they might find for the plaintiff for the value of the trees, and the jury, in returning a verdict for the plaintiff, stated that they found the line claimed to by the plaintiff to be the correct line; a new trial was granted, it not appearing to the Court that on such finding the jury had confined their damages to the trespass for cutting the trees. *Lyons v. Merritt*, 1 All. 91.

**34—Excessive damage.**

In an action against a surgeon for negligence in treating a patient, whereby it was alleged that he lost his hands and feet, a verdict was given for the plaintiff for \$25,000. *Held*, That the damages were excessive, the jury having found, that, without any negligence, the plaintiff would have lost a portion of his hands. In such a case, the Court ordered a new trial, though the plaintiff was willing to assent to reduce the amount of the verdict. *Key v. Thomson*, 1 Han. 297.

**35—Evidence obscure.**

A new trial will be granted on payment of costs, where the evidence is obscure, and the case requires further investigation to ascertain whether justice has been done. *Fiddes v. Henderson*, C. Ms. 47.

**36—Ejectment—Evidence conflicting—Preponderance.**

A new trial will be granted in an action of ejectment, where the verdict for the plaintiff would change the possession, the evidence being conflicting and preponderating in favour of the defendant. *Doe dem. Thompson v. Dewar Hil. T. 1827.* See Supra I. 11.

**37—Surprise—Cause unexpectedly called on.**

The Judge at *Nisi Prius* stated on Wednesday that he would not continue the Court beyond the following Saturday night, except for the purpose of finishing a cause then on trial, in consequence of which, a material witness for the defendant in one of the causes on the docket left the county on Friday morning by the consent of the attorney (there being then no prospect of the cause in which he was a witness being reached that week); on Saturday evening the Judge stated he would finish the cause then on trial that night, and call on the next case, being the case in which the witness had left the county, on Monday morning; and the cause was tried accordingly on Monday under a protest by the defendant's counsel, against the cause being tried in the absence of his witness, and a verdict given for the plaintiff. *Held*, That the defendant was entitled to a new trial on the ground of surprise; and that his right was not waived by his counsel attending at the trial, and making the best defence he could under the circumstances. *Meehan v. Sawtlier, East. T. 1871.*

**38—Verdict contrary to Judge's charge—Important principle involved—Though damages small.**

Where a verdict is contrary to the Judge's charge, a new trial will be granted, though the amount of damages which the plaintiff would be entitled to recover is small, the principle involved in the case being important. *French v. Hodgin, Trin. T. 1833.*

**39—Clear point of law.**

On a clear point of law, the Court will set aside the verdict *toties quoties* where there is an improper finding by the jury. *Estabrooks v. Orser, 1 Kerr 57.*

**40—Cause tried as undefended—False statement.**

Where a cause was tried out of its order, and in the absence of the defendant's attorney, on the statement of the plaintiff's counsel that it was undefended, the verdict was set aside on an affidavit of merits, and that defendant had intended to defend it. *Sayre v. Steves*, 5 All. 86.

**41—Plan used by jury without cognizance of Judge or party—Affidavit of juror refused.**

In an action of trespass to try a disputed boundary, one of the witnesses, during the progress of the trial, made a plan of the land and gave it to one of the jurors, explaining to him what the plaintiff claimed: this plan was used by the jurors without the knowledge of the Judge, or of the defendant's counsel, a verdict for the plaintiff was set aside on this ground, without any examination into the merits of the case, the Court refusing to hear affidavits from the jurors that they were not influenced by the plan. *Oulton v. Bowser*, East. T. 1873. See *Infra* 43.

**42—Rejection of evidence—Replevin—Plea non tenuit—Right to shew fraud under such plea.**

The plaintiff has a right under the plea of *non tenuit*, to shew a conveyance fraudulent. It is therefore competent for an assignee of an insolvent in an action brought to replevy goods distrained for rent, to shew under such plea that the premises occupied by the insolvent, and for which the defendant claims rent, were conveyed by the insolvent to the defendant to defraud his creditors, and such fraud being shewn the relation of landlord and tenant would not exist between them so as to give effect to the conveyance as against creditors—the evidence offered to shew this conveyance fraudulent having been rejected, a new trial was ordered. *McLeod, assignee, &c. v. McQuirk*, 2 Pug. 238.

**43—Shewer—Jury of view—Plaintiff pointing out place on land.**

In trespass *quare clausum fregit*, a view was ordered. While the jury were viewing the premises, one of them asked for information about the removal of a fence which had stood on one side of the road, the right of way over

which was the question in dispute, wishing to know where it originally stood. The shewer replied that he could not inform him, and the juror then told him to ask the plaintiff; he did so, and the plaintiff in view and hearing of the juror, pointed to a place on the land, and said, "here," and the shewer then pointed out this place to the jurors, they, or one of them, at all events, having heard the question asked of plaintiff, and heard his answer given, and seen him point out the place on the land. *Held*, That this amounted to the plaintiff giving evidence to the jury; that there was a clear violation of the duty of the shewer as well as of the plaintiff, and the verdict being for the plaintiff, a new trial was ordered. *Held*, also, That neither party to the cause should be present at the view.

*Semble*, That the affidavit of a dissenting jurymen as to a conversation between himself and another jurymen, is not admissible on motion for a new trial. *Bennet v. Smith*, 1 P. & B. 27.

**44—Giving refreshments to jurors—Improper communication.**

Where there has been any improper communication by the successful party with the jurors, a new trial will be granted, even though the probable result of a second trial will be the same as the first, the defendant having taken the jury to his house and giving them lunch when there existed no necessity for so doing, and being the act of the party, and not of the officer in charge of the jury of view, distinguished the case from that of *Spence v. Trenholm*, 1 Han. 78. *Ferguson v. Troop*, 2 Pug. 183. See *infra* III. 46 *Spence v. Trenholm*.

**45—Verdict contrary to evidence—Credit to whom given.**

C. brought his clerks to R.'s hotel and engaged board for them, and said he would be responsible for payment. R. kept separate accounts with the clerks and made monthly settlements with them, but the balances were never charged against C. R. settled with C. for his own board after all the clerks had left, without making any



claim on him for payment of the amount due for the clerks' board. The jury found that the credit was given to C. Held, That the question as to whom the credit was given was properly left to the jury, but that their finding was against the right of evidence, and there should be a new trial.

Entries in books of account are not conclusive against the person making them, but may be explained. *Raymond v. Cummings*, 1 P. & B. 544.

**46—Trial before Sheriff—Privilege to cross-examine—Improper evidence pressed in.**

Where in an enquiry before a sheriff under a writ *de prop. prob.* the defendant's counsel was allowed to put a paper in evidence, without the plaintiff's counsel being previously permitted to cross-examine upon it, the inquisition was set aside. *Hannington v. Cormier*, 2 Pug. 450.

**47—Cause tried as undefended—No negligence in defendant.**

Where a cause was regularly tried as an undefended cause, but defendant was not guilty of negligence in not being present, a new trial was granted on terms of payment of costs of the trial, and of resisting the application (excepting costs of affidavits), and on defendant paying into court the amount of the verdict or giving security, plaintiff to have liberty to change venue if he please. *Freeman v. Wood*, 2 P. & B. 219.

**48—Remarks on testimony—Judge making or omitting to make.**

A new trial is never granted on the point of a Judge making or omitting to make a remark as to the character of testimony. Per C. J. Ritchie in *McLeod, Assignee, v. McGuirk*, 2 Pug. 238.

**49—Damages too small.**

A new trial will sometimes be granted if it appears clear to the court that the damages are too small, or that the smallness of the damages has arisen from some mistake of the Judge. *Price v. Erb*, 1 P. & B. 708.

**50—Improper admission of evidence—Sailing Chart—Possible influence on jury of reception of improper evidence.**

Where a sailing chart was put in evidence and a witness asked, on cross-examination, in what respect it differed from another on board the defendant's vessel. *Held*, That the evidence was improperly admitted.

Where improper evidence is put in by counsel contrary to the opinion of the Judge presiding, the court will not undertake to say it had no influence with the jury, and will grant a new trial. *Jackson v. McLellan*, 2 *Pug.* 88.

**51—Misdirection—Right of way—Footway as distinguished from carriage-way, &c.**

Declaration alleged right of way in plaintiff for horses cattle, and carriages, and obstruction to same, and on the trial this was the only claim set up. The Judge, however, in charging the jury, told them that if they should find a right of way for carriages, cattle, or foot passengers, plaintiff should have a verdict. *Held*, An erroneous direction, and a new trial ordered. *McRoberts v. McBride*, 3 *Pug.* 48.

**52—Improper rejection of evidence—Ouster.**

Proof of the defendant's having locked the gate against the plaintiff, endeavouring to exclude him from the joint property, and of his having refused to suffer the plaintiff to enter, denying his title, is evidence of Ouster, and was improperly withheld from the jury, and new trial granted on that ground. *Brown v. Moore* 2 *Pug.* 42.

**53—Compromise—Verdict unsupported by evidence.**

When the verdict is evidently a compromise and is unsupported by either view of the evidence there will be a new trial. *Smith v. Lunt*, 2 *Pug.* 64.

Though the practice of counsel in a cause giving evidence is most objectionable, yet a judge at *nisi prius* has no authority to refuse it if offered and a new trial ordered where evidence was rejected. *Bank of B. N. A. v. McElroy*, 2 *Pug.* 462.

**Improper reception of Evidence—Subsequent withdrawal by Judge.**

*See Evidence III. 80. Wilmot v. Vanwart.*

**Constable—Arrest and rescue—Verdict against evidence.**

See Trespass. V. 13. *Tait v. Stronach.*

**Surprise—Unexpected Statements.**

See Evidence I. 27. *Philps v. Trueman.*

III.

REFUSAL—INSUFFICIENCY OF REASON.

**1—Not taking advantage of available evidence.**

Where plaintiff in trespass *q. c. f.* had it in his power to shew definite bounds, but relied on the uncertain lines of another grant, and the jury found against him, the Court refused to disturb the verdict. *Bates v. Lyon, Ber. 63.*

**2—Unconscionable defence—Release.**

The Court will not set aside a verdict obtained in an undefended cause, to enable the defendant to set up a release given by the plaintiff before trial, where it appeared that he was living out of the country, separated from his wife, and that the action was brought by her for wages due from the defendant, after her husband had abandoned her. *Cark v. Robinson, Ber. 86.*

**3—Imaginary damages.**

A new trial will not be granted for imaginary damages. *Wison v. Ellis, Ber. 325.*

**4—Point not raised on trial—Nominal damages.**

The Court will not grant a new trial on the grounds that nominal damages should have been given when the point was not raised at the trial. *Rogers v. Peck, et al., Ber. 318.*

**5—Assault—Injury slight.**

A new trial was refused in an action for assault and battery, where the verdict was for the defendant; though it was against the Judge's direction; the jury being slight, and the defendant assenting to a *stet processus*. *Moore v. Ogden, 1 Kerr 278.*

**6—Plaintiff's claim not exceeding £5.**

The Court will not set aside a verdict for the defendant and grant a new trial in an action of common assumpsit,

on the ground of the verdict being against evidence, where it clearly appears that the plaintiff's claim does not exceed £5. *Williston v. Walsh*, 2 *Kerr* 181.

**7—Cause tried as undefended—Letter not received in time.**

An application for a new trial, on the ground that the cause was tried at Woodstock as undefended on the 27th September, the second day of the Court, owing to a letter of the defendant's attorney, giving instructions for the defence, not having been delivered at the post-office in Woodstock, when inquired for on the morning of the 27th, although it had been received at the office on the previous evening, was refused; it appearing that the letter was not dispatched from Saint John, where the attorney resided, until the 35th, and could not reach Woodstock until the evening of the day the Court opened. *Smiley v. Winslow*, 2 *Kerr* 349.

**8—Due diligence not used—Terms of new trial.**

A cause was called on in regular course, and tried in the absence of the defendant and his counsel on the first day of the Court. A new trial was refused, except on the terms of paying money into Court or giving security, it appearing that although the defendant's absence was accidental, he had not used due diligence either in preparing for trial, or getting to the Court. *Gibbs v. Steadman*, 2 *Kerr* 406.

**9—Discovery of new evidence—Affidavit—Several trials.**

The Court refused to set aside a verdict for the plaintiff, and grant a new trial, on the ground of discovery of new evidence, upon the affidavit of G. that he knew of facts which were very material to the defence; that he was present at the last trial, but did not mention the circumstance until after it was concluded. The facts were particularly set out in G.'s affidavit, which was however expressly contradicted by other affidavits; and there were affidavits of six respectable persons, that G. was a man of bad character and utterly unworthy of credit. The cause

was of large amount, had been three times tried, and occupied several days each time. *Connell v. Miller*, 2 Kerr, 493.

**10—Absence of defendant's counsel from Court.**

Where a cause was tried as undefended, in consequence of the defendant's counsel not being in Court when it was called on, the Court refused a new trial, though the amount in dispute was large, and the defendant swore that he had a good defence; but the defence appeared to arise out of partnership transactions between them which remained unsettled. *Doherty v. Hogan*, 2 Kerr 492.

**11—Damages not outrageous.**

A new trial will not be granted in an action for a malicious arrest, on the ground of excessive damages, unless the damages are outrageous. *Wentworth v. Hallett*, 2 Kerr 560.

**12—Damages—Question for jury.**

In an action for trespass, the amount of damages is entirely for the consideration of the jury, and the Court will not in general disturb the verdict. *Hadden v. White*, 2 Kerr 635.

**13—Damages—Contrary to direction of Judge—Not excessive.**

In trespass for taking goods under an execution which was afterwards set aside as illegal, the plaintiff proved that on the levy, and without the goods having been taken from his possession, he paid the Sheriff £10, the amount of the execution; the judge told the jury that the amount paid by the plaintiff was a fair measure of damages, but they gave a verdict of £29. *Held*, That the damages were not so excessive as to justify the Court in granting a new trial. *Wilson v. Street*, 3 All. 251.

**14—Damages Large—Assessed properly.**

Where the jury do not appear to have assessed the damages on a wrong principle or acted under the influence of improper motives or bias, the Court will not disturb their finding even if the damages are larger than they might have been disposed to give as jurors. *Godard v. the Fredericton Boom Company*, 1 Han. 536.

**15—Excessive damages—Proper direction of Judge as to measure of.**

Where in action to recover insurance, the defendant's witness contradicted the plaintiff as to the value of goods lost by fire, but the jury were properly directed as to the measure of damages, the Court refused to disturb their verdict, even though they might have given less as jurors. *Crozier v. the Phoenix Insurance Company*, 2 *Han.* 200.

**16—Damages—Left to jury as to question of.**

The question of damages having been left open to the jury, and the verdict being for plaintiff, the Court refused a new trial on the ground of excessive damages, although it appeared that the depreciation of the mill property since the date of agreement in question was much greater than the difference between the consideration paid and the amount of the verdict. *Smith v. Millage*, 2 *Kerr* 408.

**17—Damages excessive—Conflicting evidence.**

Where in trespass there was conflicting evidence as to the quantity and value of trees taken from plaintiff's land, the Court refused to disturb the finding of the jury, even though the damages appeared large. *Prescott v. Walton* 2 *Han.* 230.

**Damages when not considered excessive.**

See Damages I. 27.—Malicious Arrest. &c. 7.—*Infra* 38, 39.

**18—Damages excessive—Assault on public officer.**

A new trial on the ground of excessive damages (£230) was refused in an action for assault and battery, defendant being a public officer, and having knocked the plaintiff down in the street and kicked him, in consequence of a dispute between them relative to matters connected with defendant's office. *Wilson v. Saunders*, *Hil. T.* 1832.

**18 a—Nominal damages.**

A new trial refused to the plaintiff in an action against a Justice for false imprisonment where the verdict was for nominal damages, though the conviction and warrant of commitment were illegal, the case having been fairly left to the jury. *Sewall v. Olive*, 4 *All.* 394.

**19—Immaterial evidence admitted.**

Where the evidence objected to was immaterial and unnecessary a new trial was refused. *See McKenzie, Curator, v. Scovil, 2 Han. 6.*

**20—Executors—Administration—Smallness of amount**

In an action against three defendants as executors, two of whom had fully administered, and the amount in the hands of the other defendant was very small, the Court refused to set aside a verdict in favor of all the defendants. *Crookshank v. McFarlane, 2 All. 544.*

**21—Surprise—Defendant's knowledge.**

A new trial on the ground of surprise was refused when defendant knew the day before the trial of the evidence the plaintiff was going to give and might have applied for a temporary postponement of the trial in order to answer the evidence. *Gilbert v. Stockton, 1 Han. 59.*

**22**——It is no ground for a new trial on the ground of surprise, that the plaintiff if he had been present at the trial, could have contradicted part of the defence set up which he did not expect, he having been voluntarily absent from the trial. *Rankin v. Weldon, 6 All. 220.*

**23—Misdirection—Defendant not being called as witness—Inference.**

Where defendant knew all the circumstances, and might have been called as a witness. *Held*, That it was not a misdirection to tell the jury they might infer that if the defendant had been called, his evidence would not have benefited his case. *Tufts v. Hatheway, 4 All. 62.*

**24—Evidence rejected—Tender.**

Evidence rejected at a certain stage of cause, but not subsequently tendered, is no ground for a new trial if it has not been absolutely rejected. *Ibid.*

**25—Expression of opinion of Judge on effect of evidence—Evidence not tendered.**

The expression of a wrong opinion by the Judge on the effect of evidence offered, upon which the council withdraws it, is not a ground for a new trial. The evidence should be distinctly tendered. *Ruel v. McElroy, 3 All. 212.*

**26—Notice to produce—Generality of—Secondary evidence—No objection at trial.**

If secondary evidence of a paper is admitted without objection from the party on whom a notice to produce has been served, he cannot afterwards on motion for a new trial object that the notice to produce was too general. *Rose v. Lindsay*, 3 Kerr 645.

**27—Insufficiency of evidence—Fraud.**

In trover for timber seized by the defendant, as Sheriff of Saint John, under a *fi. fa.*, issued against P. at the suit of S. B., which timber was claimed by the plaintiff, as trustees under a deed of assignment made by P. to them, expressed to be for the general benefit of the creditors, and executed just before the signing of a judgment in S. and B.'s suit, and the intent of which was to prevent his property being taken under the execution upon such judgment, the case went to the jury upon the question of fraud in the assignment, who found for the defendant. A new trial was granted on payment of costs, it appearing that P. was insolvent at the time of the assignment, that an actual delivery of the timber had been made to the plaintiffs before the issuing of the *fi. fa.*, and the evidence being insufficient in the opinion of the Court to shew that the deed was not intended to be for the benefit of the creditors as expressed on the face of it. *Hayward v. White*, 2 Kerr 304.

**28**——Although the *bona fides* of a trust deed, whereby the debtor's property is all assigned to trustees for the benefit, in the first instance, of certain preferred creditors, and afterwards for the benefit of all the creditors generally, is a question for the jury, and has been so left to them by the Judge, yet the Court will set aside the verdict, and grant a new trial, where the evidence does not appear sufficient to warrant the inference of fraud which the jury have drawn. *Burnham v. White*, 2 Kerr 571.

**29—Fraud—Question for jury.**

On a question, whether the sale of a horse was fraudulent or not, the jury having decided in the negative, the Court refused to disturb the verdict; the question having



been left broadly to the jury upon evidence which was reconcilable with either view of the case. *Little v. Johnson*, 1 Kerr 496.

**30—Admission of improper evidence under pleadings  
—Want of objection.**

Where a matter of defence, which should have been pleaded especially, and on which the decision of the case mainly depended, was urged to the jury without objection, and the case was fully tried, a new trial was refused on the ground of improper admission of evidence of such defence under the general issue. *Brown v. Cunard*, 3 All. 316.

**31**——In trespass for impounding cattle, the defendant pleaded “not guilty,” and at the trial his counsel opened a defence, justifying the impounding the cattle *damage feasant* and examined several witnesses to prove it, the plaintiff’s counsel then objected that the evidence was not admissible under the plea; but further evidence was received, and the defendant obtained a verdict. The Court refused a new trial on the ground of the improper admission of the evidence, the damage, if any, being very small.

*Quære*, whether the plaintiff had not waived the objection, by not taking it before the defendant gave any evidence of justification. *Campbell v. Wheeler*, 1 Han. 269.

**32—Excessive distress—Nominal damages.**

Where in an action for excessive distress, the law was correctly stated to the jury, who found a verdict for the defendant, the Court refused a new trial, though they were of opinion that there was excess which might have entitled the plaintiff to a verdict for nominal damages only; a new trial under such circumstances being only grantable on payment of costs. *Ruel v. Beer*, 3 All. 369.

**33—Allegation of custom—Issue taken—Custom invalid.**

Where the declaration alleged a custom as the foundation of the cause of action, and the defendant took issue thereon, which was found in favor of the plaintiff, it is no ground for a new trial that the custom proved is invalid.

The objection should be taken by demurrer or motion in arrest of judgment. *Breen v. Elkin*, 4 All. 187.

**34—Surprise.**

In an action by a surviving partner, a verdict was given for the defendant, on proof of a deed of assignment from him to the plaintiff and M. in trust for the benefit of creditors, which had been executed by the deceased partner, in the name of the firm, and released the debt due from the defendant. A new trial on the ground of surprise was refused, though the plaintiff was absent from the country at the time the deed was executed, and knew nothing of it till it was produced at the trial, and the deceased partner was shown to be in a weak state of mind at the time it was executed. *Tisdale v. Hartt*, 4 All. 257.

**35—Judge receiving evidence after charge to jury.**

It is discretionary with the presiding Judge at what time he will receive evidence on a trial; and where he received evidence on the part of the plaintiff, after summing up the jury; and after the defendant's counsel had consented to a verdict, subject to a motion for a non-suit, a new trial was refused. *Oulton v. Reed*, 6 All. 283.

*See Infra* 58.

**36—Juror—Relationship.**

The fact that a juror who was open to challenge on the ground of relationship to the defendant has served on the jury is not *per se* a ground for a new trial, there being no evidence of mis-conduct in the juror and the verdict not otherwise objected to, and the defendant and the juror both swearing that they were not aware of the relationship at the time of the trial—even though the plaintiff was not aware of it either. *Bishop v. Goff*, 6 All. 389.

*See Infra* IV. 5.

**37—Replevin—Smallness of recovery.**

In an action for replevin for logs the plaintiff was entitled to recover a small portion—about 6,000 feet—but the jury found for the defendant, a new trial was refused as it could only have been granted on payment of costs. *Tompkins v Tibbets*, 1 Han. 317.

**38—Replevin—Substantial question.**

It is no ground for a new trial in Replevin that the jury have not distinctly found on the several issues, it being understood that the substantial question was to whom the property in dispute belonged; and that the Court might enter the verdict on the several issues accordingly. *Fearon v. Murray*, 5 All. 11.

**39—Fraud uncontradicted—Suspicious circumstances.**

In an action on a policy of insurance, though the circumstances of a loss are suspicious, if there is some evidence of its being accidental, which is uncontradicted, and the question of fraud has been fully left to the jury, who find for the plaintiff, the verdict will not be disturbed. *Dimock v. The New Brunswick Marine Assurance Company*, 1 All. 398.

**40—Credibility of witness.**

Where a case depended upon the testimony one witness, whose credibility was properly left to the jury and they found a verdict against his evidence, the Court refused a new trial. *Wortman v. Marter*, 3 All. 309.

**41—No disputed point of law—Fraud—Jury—Credibility of witness—Cumulative evidence.**

Where there is no disputed point of law, but the case turns on a question of fraud, and depends upon the credibility of conflicting testimony, the Court is reluctant to grant a third trial on the ground that the verdict is against the weight of evidence. *Smith v. Neill*, 4 All. 105.

Neither cumulative evidence, nor evidence merely to discredit a witness, is sufficient to obtain a new trial on the ground of discovery of new evidence. *Ibid.*

**42—Newly discovered evidence—Cumulative.**

Where the estate of the plaintiff, claiming under a will, was subject to a condition subsequent, and the defendant endeavored on the trial to shew a request and refusal to perform the condition, in order to defeat the plaintiff's estate; and newly discovered evidence bearing on that point is cumulative, and is no ground for a new trial. *Doe dem. Myers v. Babineau*, 6 All. 89.

**43—Improper reception of evidence—Immaterial Testimony.**

Where the question in an action was the true dividing line between two Crown grants, and a subsequent grant from the Crown was improperly received in evidence, a new trial on the ground of the improper reception of this evidence was refused: it being evident that it had no bearing on the question in dispute, nor any influence on the question left to the jury. *Carter v. Saunders*, 6 *All.* 147.

**44—Improper admission of evidence—Withdrawal.**

Though improper evidence of damage has been given, if it has been expressly withdrawn by the judge from the consideration of the jury, and by subsequent evidence in the cause, it becomes immaterial, the Court will not disturb the verdict on the ground of its improper admission. *Spurr v. Albert Mining Co.*, *East T.* 1871.

**45—Jury separating after the Judge's charge.**

The Jury separating after the Judge's charge, and before verdict, will not invalidate the verdict, if there has been no tampering with them. *Lymburn v. DeVeber*, *Hil. T.* 1828.

**46—Jury lodging and boarding at plaintiff's house—Necessity—No improper conduct.**

Where a jury of view supped and slept at the plaintiff's house after completing the view—*Held*, No ground for disturbing a verdict for the plaintiff, it appearing that no communication respecting the suit had taken place between the plaintiff and the jury; that there was no inn within ten miles of the place, and no house near except the plaintiff's and his son's, where all the jury could be accommodated; that the jury were taken to the plaintiff's house by the Deputy Sheriff, who attended them, and who objected to their separating; and there was no complaint that the verdict was against the evidence. *Spence v. Trenholm*, 1 *Han.* 77.

*See Supra* II. 30.

**47—Plaintiff entitled only to nominal damages.**

Where the Judge improperly directed the jury to find for

the plaintiff with nominal damages; but they found for defendant—the Court refused a new trial—it being an action against the Sheriff for an escape, in which the plaintiff could, at most, have recovered nominal damages. *Atkinson v. Mitchell*, 6 All 345.

**48—Rejection of evidence—Immaterial deed.**

Where a deed was improperly rejected; but it was clear that it would not have proven title in the defendant—the purpose for which it was offered—a new trial was refused. *Doe d. Sherlock, v. Powers* 6 All. 232. (See *E. India Co. v. Paul*, 7 Moores P. C. 109.)

**49—Evidence inconsistent—Possession.**

The defendant claimed a lot of land by adverse possession, stating that he had been put in possession by the owner (since deceased) more than twenty years before the action. The land was principally wilderness; and the jury having found a verdict for the plaintiff for all except the improved land, the Court refused a new trial—the defendant's evidence of having been put into possession being inconsistent with other facts of the case. *Doe v. Guiggy*, 4 All. 602.

**50—Nominal damages.**

The Court will not send a case down to a new trial to recover merely nominal damages. See *Belyea v. Ham*, 2 Han. 27.

**51—Misconduct of juror—Objection—Challenge.**

The proper mode and time for objecting to a juror is by challenge when he is called to be sworn; therefore where an application is made to set aside a verdict for misconduct of a juror, all knowledge of the ground of objection until after the jury were sworn should be positively denied *Olive v. Belyea*, 1 All. 463.

An offer to a juror to bet a treat upon the result of a trial, which he accepted, but swore he never afterwards thought of, and did not consider as a bet, is not a ground for setting aside the verdict. *Ibid.*

**52—Jurata—Mistake in.**

A mistake in the jurata of a *nisi prius* record is not a ground for a new trial. *Palmer v. Gilbert*, 1 *All.* 505.

**53—Variance—Declaration and record.**

A variance between the copy of declaration delivered and the *nisi prius* record, which did not appear to have misled the defendant and could not reasonably do so, is not a ground for a new trial. If discovered before the trial, it might be amended on motion. *Portland Ferry Co. v. Pratt*, 2 *All.* 17.

**54—Amendment—Lateness of—Consent rule.**

A consent rule was entered into by mistake, for more land than the defendant claimed. The day before the Circuit Court he obtained a Judge's order to amend the consent rule by confining it to the land in dispute; the plaintiff entered the cause the first for trial, and a verdict was given for the defendant. *Held*, That the lateness of the amendment was no ground for disturbing the verdict, and that if it was likely to prejudice the plaintiff it should have been urged before the Judge. *Doe v. Baxter*, 2 *All.* 377.

**55—Point not distinctly reserved—Mistake in statute Correction.**

By the accidental omission of the word "not" in the Rev. Stat. Cap. 126, the action for use and occupation was given on a demise by deed. In assumpsit for use and occupation on a verbal agreement, the Statute was not brought to the Judge's notice, but it was objected generally that the plaintiff could not recover. On a verdict for the plaintiff the court refused a new trial—the mistake in the Statute having been rectified. *Seery v. Brayley*, 3 *All.* 315.

In such a case the defendant should have tendered a bill of exceptions, and not appealed to the discretion of the Court. *Ibid.*

**56—Irrelevant testimony—Not submitted to jury.**

A new trial will not be granted though evidence has been improperly received, if such evidence is altogether irrelevant to the issue, and was not submitted to the jury,

and their verdict was expressly given on grounds entirely independent of such evidence. *Bryson v. Hamilton, East. T. 1873.*

**57—Evidence pressed in against opinion of Judge.**

Where evidence in reply is pressed in against the opinion of the judge a new trial may be granted, but whether it will be granted or not, must depend upon the circumstances of the case. *McDonald v. Cumming, 2 Pug. 282.*

**58—Time of receiving evidence.**

A new trial will not be granted on the ground that evidence otherwise admissible has been received at the wrong time—no injustice being shewn to have been done by its admission. *Ibid. See Supra No. 35.*

**59—Incorrect evidence—No application to have it struck out.**

Paper writing admitted in evidence, defendant not calling witnesses to prove it was not written by him, and when this was proved, not having moved to have paper withdrawn from consideration of the jury, defendant could not avail himself of its admission as a ground for new trial. *Whittaker v. Welch, 2 Pug. 445.*

**60—Immaterial evidence—Substantial question.**

When the substantial question in the case was whether a sum of money was paid as a settlement of accounts, the Court refused a new trial moved for on the ground of misdirection in the Judge leaving to the jury whether a draft for the amount was a settlement, no draft being in evidence—it being quite immaterial whether the money was paid by means of a draft or not. *Jones v. McIntosh, 2 Pug. 343.*

**61—Discovery of evidence—Contradictory affidavits on shewing cause.**

When the defendant on the trial swore to a final settlement and an order given plaintiff for the balance, the Court refused to grant the plaintiff a new trial on an affidavit stating the paper sworn to as having been an order had been found since the trial and that it was not an order but a statement of an account with another party. The

plaintiff should have rebutted the testimony as to the settlement and order and given secondary evidence of the contents of the paper first proving its loss.

The affidavit used on shewing cause against the rule contradicted the plaintiff's affidavit. *Cyr v. Hartt*, 2 *Pug.* 71.

**62—Judge expressing opinion on question of facts.**

It is not a ground for a new trial that the Judge has expressed an opinion to the jury upon a question of fact, provided he did not withdraw the consideration of the question from them, even though the opinion expressed was incorrect. *Doe dem. Fairweather v. Nevors* 2 *Pug.* 614.

**63**———In an action of ejectment, where the defendant claimed title by possession, and relied on the fact that the defendant's father had cut wood on two occasions spoken of and he had pastured his cattle there, it was held not improper for the judge to express the strong opinion which he entertained that the acts relied on were, under the circumstances of the case, mere acts of trespass, and not acts of possession; and that it would have been a very unsatisfactory mode of leaving the question to the jury, if he had merely told them that if they believed the defendant's father had cut the wood on the occasions spoken of and he had pastured his cattle there, as he said, and they thought these acts were acts of ownership and not mere acts of trespass, to find a verdict for defendant. *Ibid.*

Judge making or omitting to make remarks on character of testimony. See new trial II, 48. *McLeod v. McGuirk*.

**64—Entry into house by rightful owner—Direction of Judge — Substantial question left to jury — Reception of evidence—Subsequent withdrawal.**

In his address to the jury, the Judge told them that the defendant being the legal owner of the house had a right to enter peaceably and take possession in the manner stated in the plea. The plea stated that at the time of the alleged trespass, the defendant was possessed of a dwelling house wherein the plaintiff, Margaret Napier, was trespassing and making a noise, that the defendant requested her



to leave the house which she refused to do, and thereupon he gently laid his hands upon her in order to remove her from the house, doing no more than was necessary for that purpose, which were the alleged trespasses. *Held*, (by Weldon, Fisher and Wetmore, J. J.,) That as the case turned upon the excess of force used in the expulsion, and this was fairly left to the jury, the use of the word "peaceably" in that connection was not misdirection, and that defendant was not entitled to a new trial: but (by Allen, C. J. and Duff, J., *dissenting*,) that it was not clear that the jury had not been influenced by the the word "peaceably," nor that they had not given damages for the forcible entry as well as for the excess of force used in the expulsion. *Held*, (by Weldon, Fisher and Wetmore, J. J.,) That as the question as to whether or not the female plaintiff contributed to the injuries received while being expelled from the defendant's house by her resistance, or by her exertions on the subsequent day was involved in the question of excess submitted to the jury, the want of more specific and particular direction on this point was not ground for a new trial: (by Allen, C. J., and Duff, J., *dissenting*,) that it was material that the attention of the jury should have been drawn particularly to the question whether her own struggling and resistance had, or had not in any degree contributed to the injuries complained of, this being a matter which might materially affect the damages. The defendant's counsel requested the judge to leave several questions to the jury, the substance of which was contained in the questions submitted to them, and the request was refused. *Held*, Properly so. K., a former owner of the property in question, stated in his direct examination that he made no agreement with N., that she was to receive whatever sum the property sold for, over \$1800.00, or any sum whatever. The plaintiff's counsel, on cross-examination, holding a letter in his hand and reading it, asked K. if he had not authorized one S. to write a letter to N. making such an agreement. The jury were directed that the evidence on that point did not affect the case, and it was substantially withdrawn from their consideration.

*Held*, That the evidence was properly received, but that even if it was not admissible, its reception was not ground for a new trial, as it had been withdrawn from the consideration of the jury. *Napier v. Ferguson*, 2 P. & B. 415.

**65—Excessive damages.**

The plaintiff, travelling on the Intercolonial Railway on a through ticket from Picton, Nova Scotia, to St. John, was requested by the defendant, a conductor, to give it up and accept a conductor's check instead, in accordance with his instructions received from the superintendent of the road. On his refusal, the defendant stopped the train and put the plaintiff off, using no unnecessary force. For this the jury gave the verdict for \$500 damages. On a motion for a new trial, the Court (Wetmore, J., *dissentiente*) refused to disturb the verdict on the ground of excessive damages, though admitting them to be larger than they would have given under the circumstances. *Morton v. Bartlett*, 2 Pug. 215.

**66—Tort.**

In actions of tort, the mere fact of the damages being high and more than the Court would have given, is not a sufficient ground for disturbing the verdict. *Brewing v. Berryman*, 2 Pug. 515.

**67—Ejectment—Recovery of premises in consent rule mentioned—Defendant entitled to part.**

When the plaintiff in ejectment recovered a verdict for the whole of the premises described in the consent rule, the Court refused to grant a new trial, even though the defendant might be entitled to a small portion of the premises. *Idoe dem. Mckenzie v. Mosher*, 2 Pug. 355.

**68—Objection which might have been taken on trial—Want of Allegation in declaration.**

When the declaration did not oblige any usage to carry deck loads in the trade between New York and St. John, and both parties gave evidence in regard to such usage, the one to establish and the other to negative any such usage. It was *held*, That an objection on that ground taken on motion for a new trial was made too late, and

that the Court might allow the plaintiff to amend the declaration, or add a new count. *Cameron v. Domville*, 1 P. & B. 647.

**69—Verdict against evidence—Jury discrediting witness.**

Where upon the trial of a cause a witness for the defendant swore that the plaintiff signed and sealed a certain instrument, which evidence was uncontradicted, but from the appearance of the paper itself it was doubtful whether it was sealed at the time of signing, and the jury disbelieved the witness and gave a verdict accordingly, the Court refused to disturb the verdict. *Edmundson v. Temple*, 1 P. & B. 568.

**70—County court judge—Verdict in his opinion against evidence.**

Where the County Court Judge who tried the cause and who had the advantage of judging of the manner in which the witnesses gave their testimony has after judgment and deliberation come to the conclusion that the verdict is against the evidence, the judgment will not be reversed on slight grounds. *Smith v. Andrews*. 1 P. & B. 541.

**71—Release given—Plaintiff notwithstanding proceeding to trial—Proper course to adopt.**

Where after notice of trial, the parties agreed to settle the suit, and a release was given, but the plaintiff withdrew any further notice to the defendant and his attorney and in their absence tried the cause and obtained a verdict, the Court refused to set aside the verdict and enter a discontinuance—the proper remedy being to move for a new trial on the ground of surprise and then to plead the release *Puis darr. continuance*. *Johnston v. McDonald* 5 All. 379.

**72—Non-suit at plaintiff's request—Subsequent motion.**

When a plaintiff was non-suited at his own request, in consequence of certain evidence given by the defendant, he cannot move to set aside the non suit on the ground that such evidence was improperly admitted. *Holmes v. Billings* 5 All. 232.

**73—Trial of undefended cause—Neglect in defendant's attorney.**

Where a cause was tried in its order as undefended, in the absence of the defendant's attorney who was prevented from illness from leaving his house, and no application was made for time when the cause was called on; a *rule nisi* to set aside the verdict was refused, it appearing that the attorney had been in Court a few days before the trial and had made arrangements that another cause in which he was the attorney and which stood higher on the docket than this cause, should stand over in consequence of his illness. *Boyne v. Elston*, 5 All. 164.

**74—Verdict taken by consent with leave to move for new trial—Objection not taken at trial.**

Where a verdict was taken for the plaintiff by consent, with leave to the defendant to move to enter a non-suit on points reserved, and with leave to move for a new trial on the ground of improper reception of evidence the defendant cannot move for a new trial on another and different ground not taken at the trial. *Doe dem. Heathcote v. Hughes* 2 P. & B. 296.

**75—Verdict on issue on merits—Finding on wrong issue.**

Where in replevin the defendant was entitled to a verdict on the merits on one of the issues, but the jury found for him on an issue which should have been found for the plaintiff, the Court refused a new trial giving the plaintiff leave to amend the verdict by entering it on the issue which should have been found for the defendant. *Baxter v. Johnston* 5 All. 350.

**76—Summary action.**

A new trial cannot be granted in a summary action under the Act 12 Vic., cap. 40, though the evidence may have been improperly rejected, or the jury may have been misdirected. *Coy v. Teoman*, 5 All. 257.

**77—Verdict for small amount—No certificate for costs.**

Where the verdict was for a small amount, and there was no certificate for costs, the Court refused to grant a new trial, the case having been twice already before the Court. *Adam v. Berlanquet*, 2 Pug. 70.

**78—Smallness of verdict—Money demand.**

In a money demand, the smallness of the verdict is a ground for refusing a new trial. *Caldwell v. Keith*, 5 *All.* 590.

**79—Ejectment—Verdict against evidence.**

A plaintiff in ejectment will not be granted a new trial on the ground of the verdict being against evidence, unless under exceptional circumstances. *Doe dem. Hache v. Hache*, 2 *Pug.* 348.

**80 Point not raised at trial—Setting aside nonsuit.**

Where counsel in moving to set aside a nonsuit sought to raise an objection not taken at the trial, the Court refused to consider the point. *Doe dem. McVey v. Daniel*, 2 *Pug.* 372.

**81—Order improperly made when not a ground for a new trial.**

Where a party on the trial applied for leave to amend the declaration and the application was granted and the trial put off—the costs to abide the event of the suit—such order though improperly made was not a ground for a new trial. *Smith v. Gerow*, 2 *Pug.* 425.

**82—Paltry matter—Compensation recoverable in Justice's Court.**

Plaintiff sued defendant for trespass to his land by cutting a tree, the value of which was only a few shillings. Defendant neither acted wilfully nor claimed title to the land, and the judge who tried the cause thought the action should never have been brought. The jury returned a verdict for defendant; and on motion for new trial, the Court held that, though in point of law, defendant was guilty of trespass, yet plaintiff should have sued in a Justice's Court, if at all, and refused a rule for a new trial. *Sinclair v. Spence*, 3 *Pug.* 263.

**83—Title to land—Fact of gaining possession.**

As between parties without title, each seeking to make a title for himself, the Court will not interfere with the finding of the jury unless clearly and unequivocally wrong. *Eastbrooks v. Brean*, 2 *Pug.* 304.

**84—Using affidavits made on previous application to be without prejudice.**

An affidavit of the defendant Sheriff of Westmoreland which had been used on an application for an attachment against an attorney of this Court for aiding in an escape, which application was made by the plaintiff's attorney free of charge and without prejudice to either party was used on the trial of an action against the Sheriff for escape. *Held*, That this was not ground for a new trial, but the propriety of using them was questioned. *Jones v. Botsford*, 1 P. & B. 62.

**85—Cause tried out of order in docket.**

It is no ground for setting aside a verdict on the score of irregularity, that a cause has been tried out of its order in consequence of several causes standing on the docket before it having been put off by consent to a further day. *Bowes v. Sutherland*, 2 Kerr 1.

**86—Evidence put in on cross-examination instead of as rebutting.**

If evidence which would have been receivable as rebutting evidence, is put in by the plaintiff during the cross-examination of defendant's witness, it is not a ground for a new trial. *Godard v. Fred'n. Boom Co.* 6 All. 448.

**Defendant resting his case on a ground untenable—  
Judge not leaving other facts to jury.**

*See Assumpsit III. 40 a. Lynch v. Reagon.*

IV.

MISCELLANEOUS.

**1—Abandoning ground on which rule nisi was granted  
—Taking different ground.**

In an action by a Church Corporation, the defendant obtained a rule nisi for entering a non-suit on the ground that the induction of the Rector was not proved. *Held*, That he could not afterwards abandon that ground, and admit the induction, in order to defeat the action on a different ground. *Doe v. Sweeney*, 1 All. 416.

**2—Allowing verdict to stand for nominal damages.**

B. agreed by a note in writing to pay A. £20 in lumber by a certain day, before which time A. assigned the contract to C. *Held*, That B. was not bound to recognize the assignment, but might deliver the timber to A., which would be a good discharge. *Green v. Williston*, 3 Kerr 58.

The delivery, however, not having been made until after the commencement of the action, a verdict which had been given for the plaintiff was allowed to stand for nominal damages. *Ibid*.

**3—Wrong verdict.**

If the jury find a verdict for the defendant in an action of libel, the Court will grant a new trial, if they think the verdict is wrong, though the Judge left the question of libel to the jury without expressing any opinion upon the writing. *Andrews v. Wilson*, 3 Kerr 86.

**4—Trespass against three defendants—Verdict against two.**

*Quere*, Whether where the two defendants are clearly liable, the evidence of the trespass by the three is ground for a new trial. *See Atkinson v. McAuley*, 4 All. 243.

**5—Juryman—Affinity.**

The fact of a jurymen, who is open to challenge, having served on the jury, is not, *per se*, a ground for disturbing the verdict; but when a juror was connected by affinity with one of the parties interested (a fact unknown to the opposite side till after the trial), the Court considered this fact in connection with the other circumstances of the case in determining on the propriety of granting a new trial. *Tuck v. Harding*, Trin. T. 1867.

*See Supra* III. 36.

**6—Court divided—Rule nisi granted.**

When the Court is equally divided upon argument, a rule *nisi* falls to the ground and the judgment follows the verdict. *Gaudin v. McKilligan*, 2 All. 477.

**7—Terms—Costs.**

It is discretionary with the Court on granting a new

trial, to require the payment of costs; but if the verdict was contrary to law or to the Judge's charge, it is usually granted without costs. *The Bank of B. N. A. v. Travis*, 2 *All.* 548.

**8—Costs—Rule silent as to.**

If the rule for a new trial is silent as to costs, the successful party on the new trial is not entitled to the costs of setting aside the first verdict. *Weldon v. Weldon*, 3 *All.* 148.

**9—Allocatur—Shewing cause.**

A new trial having been granted on payment of costs, an *allocatur* allowed for shewing cause was taxed against the party who obtained the new trial. *Held*, That such taxation was wrong, and the costs accordingly entitled to be deducted. *McEachern v. Ferguson*, 3 *Kerr* 355.

**10—Costs—Condition—Non-Payment.**

Where a new trial has been granted on payment of costs, and the costs have been taxed and demanded of the attorney of the party who obtained the rule, who was informed that unless the costs were paid, an application would be made to discharge the rule; the Court granted a rule for that purpose absolute, unless the costs were paid in ten days after service. *Scribner v. McLaughlin*, 1 *All.* 440.

**Costs to abide event of suit—Same party succeeding—Costs of shewing cause.**

*See Costs* 95.

When verdict against Judge's charge, new trial granted without costs. *Doe dem. Blair v. Chace*, 3 *All.* 502.

**11—Several counts—Verdict sustainable on one—Rejection of witness—Cross-examination—Evidence.**

In trespass *qu cl. fregit* and for cutting down a mill dam, the defendants justified the cutting under a license from the plaintiff and as Inspector of Fisheries under the act 31 Vic. cap. 60. Evidence of the alleged license was given on the cross-examination of one of the plaintiff's witnesses, who was afterwards called as a witness by the defendant, and his evidence rejected on the ground that he had been already examined. The jury negatived the license and



gave a verdict for the plaintiff for \$30 on the count for breaking the close, and \$2000 on the count for cutting the dam on the ground that the plaintiff being a tenant was bound to repair it. The verdict not being sustainable on the latter count,—*Held* (per Allen and Wetmore, J. J.) That the trespass being entirely unjustified, the plaintiff was entitled to retain his verdict on the first count, the evidence of the license having been fully gone into, and the evidence rejected not affecting this part of the case. Per Weldon and Fisher, J. J., That the evidence having been improperly rejected, the defendant was entitled to a new trial. *Betts v. Venning, East. T. 1873.*

**12—Contradictory and unsatisfactory evidence—Judge satisfied with verdict.**

*Held*, (per Fisher and Wetmore, J. J.) that where the evidence was contradictory, and the judge who tried the cause was satisfied with the verdict, a new trial should not be granted: but per Allen, C. J. and Weldon J., that the evidence on which the jury found, being in their opinion very unsatisfactory, the cause should be submitted to the consideration of another jury. The Court being equally divided the rule dropped. *Doane v. Doane, 1 P. & B. 339.*

**13—Refusing to allow defendant's counsel to address jury—Judge directing jury to find verdict.**

Where in an action of ejectment, the judge who tried the cause came to the conclusion that the lessor of the plaintiff had made out his title, and the defendants had no case to be submitted to the jury, he was right in refusing to allow the defendants' counsel to address the jury and urge them to give a verdict contrary to his direction.

In an action of ejectment, where the plaintiff's case is wholly unanswered, it is the duty of the jury to find for the plaintiff, and it is proper for the judge to so direct them.

*Quere*, Whether, when a jury find contrary to the judge's charge and direction, the verdict will be set aside as a perverse verdict without argument, or whether the correctness of the direction will be examined into by the Court. *Doe dem. Moffat v. Thompson, 1 P. & B. 516.*

**NEXT OF KIN.**

*See* Heir at Law.

**NISI PRIUS—(ORDER OF.)**

There must be a motion in Court to make an order of *Nisi Prius* a rule of Court. *Underwood v. McHenry*, 2 *All.* 94.

**Amendment of.**

*See* Arbitration V. 6.

Before an order at *Nisi Prius* can be set aside it must be made a rule of Court. *Smith v. Gerow*, 2 *Pug.* 425.

A Judge at *Nisi Prius* has authority to make such order at the trial of the causes as to him may seem requisite for the effectual despatch of business. *Bowes v. Sutherland*, 2 *Kerr* 1.

*See* Judge—Judge's order.

**NISI PRIUS RECORD.****Variance—Declaration and Record.**

*See* New Trial III. 58.—General Rules 79, 180, 191.

**When not evidence.**

*See* Set-off 6.

**Entry of Postea on, where different issues.**

*See* Replevin 4.

**NOLLE PROSEQUI.****Entering up judgment for costs.**

*See* Costs VI. 104.

**Failure of evidence.**

On the trial of an information for intrusion, a *nolle prosequi* may be entered if the evidence fails to make out the case; and it may be entered by the Solicitor General in the name of the Attorney General. *Reg. v. Sturges*, 5 *All.* 582.

**NONFEASANCE.**

*See* Pleading I. 67, *Hill v. Allan*.

**NON PROS.**

Judgment of *Non Pros* cannot be signed in a bailable action, unless the bail piece is on file, pursuant to the rule of Hilary Term, 2 Wm. IV. *Wiggins v. Dibblee*, *Trin. T.* 1884.

Cannot be signed until the defendant has filed an appearance; notice of appearance is not sufficient. *Cushing v. Gordon, Mich. T. 1872.*

**Setting aside for irregularity—Delay.**

*See Practice VI. 8, 9.*

**Evidence of Judgment of Non Pros.**

*See Evidence II. 29.*

**NON-RESIDENTS.**

**Proceedings in Equity.**

*See General rules 119, 111.*

**When proceedings cannot be taken against.**

The plaintiff remitted bills of exchange from this Province to R. in England. Before the bills became due, R. was declared bankrupt in England, and the defendant, as his official assignee, received the proceeds of the bills. *Held*, (assuming the defendant to be liable to the plaintiffs for money had and received.) That the non-payment of the money was not a breach of "a contract made wholly or in part" within this Province, and therefore that proceedings could not be taken against the defendant under the Act 18 Vic. cap. 25. *Crane v. Cazenove, 4 All. 578.*

**Necessity of obtaining Judge's order to proceed in cause.**

*See practise VI. 49.*

**NON-SUIT.**

**1—Objection apparent on record.**

Where a plaintiff has no right in law to recover, a nonsuit will be ordered, though the objection appears upon the next record. *See Next Cases 2, 3, 6. Fisher v Jewett, Ber. 85.*

2———If the defendant takes issues upon the facts alleged in the declaration, and they are proved, the plaintiff cannot be non-suited on the ground that these facts do not disclose a cause of action; but the defendant must move in arrest of judgment. *New Brunswick and Nova Scotia Land Co. v. Kirk, 1 All. 448.*

**3—Cause of action proved as alleged.**

Where that which is laid as the cause of action, is proved at the trial, the plaintiff cannot be non-suited on the ground that the facts charged do not disclose a cause of action. *Cameron v. Beardsley*, 2 Kerr 598.

**4—Voluntarily becoming non-suit.**

Where a party voluntarily becomes non-suit, he cannot afterwards move to set it aside, and obtain a new trial on payment of costs. *Thorne v. Bedell*, 3 Kerr 339.

**4 a**———When a plaintiff was non-suited at his own request in consequence of certain evidence given by the defendant, he cannot move to set aside the non-suit on the ground that such evidence was improperly admitted. *Holmes v. Billings*, 5 All. 232.

**5—Discharge of jury—No verdict—Points reserved.**

When no verdict has been given, in consequence of the discharge of the jury, a non-suit will not be granted on a point reserved at the trial. *Doe dem. Duncan v. Christopher*, Ber. 83.

**6—Material Allegation—Failure in proof.**

Though the declaration does not set out a good cause of action, and was therefore demurrable ; if the alleged cause of action is not proved, the defendant is entitled to a non-suit. Thus, in an action by overseers of the poor against the defendant, for bringing paupers into the parish, who became chargeable—alleging that the plaintiffs, as overseers of the poor, were compelled to provide for the paupers ; if it appears that the plaintiffs were not overseers at the time the paupers were brought into the parish, they fail in proving a material allegation. *Gillespie v. Phillips*, 5 All. 221.

**7—Opinion of Judge expressed—Verdict by consent.**

Where, at the trial, a non-suit was moved for, and upon hearing the opinion of the Judge, a verdict was taken by consent of counsel, the question cannot afterwards be raised as to whether the case should have been submitted to the jury. *Reed v. Weldon*, 1 Han. 458.

**8—After verdict but before recording.**

*Quære*, Whether a plaintiff can elect to be non-suited after the jury have given a verdict, but before it is recorded. See *Lawton v. Chance*, 4 All 411.

**9—Subsequent assent after argument.**

Where, at the trial, the Judge ruled that the plaintiff could not recover, an application to have a non-suit entered at the close of his argument on a rule *nisi* for a new trial, was held to be too late. *Travis et al. v. Glazier*, 2 Han. 215.

**10**———*Quære*, If a non-suit is moved for on two grounds, the one tenable and the other untenable, and it is granted on the latter, whether the former is available for defendant on argument for setting aside non-suit. See *doe dem. Connel v. Dickinson*, 1 Han. 456.

(See *Noble v. Ward*, 1 Ex. 117 L. R.)

**11—Nominal damages—Refusal to accede to verdict for.**

In trespass for false imprisonment against Justices of the Peace, where the Justices had exceeded their powers in committing the prisoner to an improper place of imprisonment for contempt, but where the plaintiff had received no greater punishment than he was entitled to by law, the Judge offered to direct the jury to find a verdict for the plaintiff with nominal damages. The plaintiff refused to accede and claimed substantial damages, whereupon the Judge non-suited him, and the Court refused to set the non-suit aside. *Armstrong v. McCaffrey et al.*, 1 Han. 517.

**12—Several pleas—Immaterial issues on some—Defendant not entitled to have finding of jury on.**

Where defendant pleaded four pleas, two of which were an answer in law to plaintiff's action, and he was non-suited, *Held*, on motion to set aside non-suit, that he was not entitled to have finding of the jury on the other issues, they being immaterial. *Martin v. Mutual Fire Ins. Co.* 3 Pug. 155. See Insurance 44.

**13**——— Misnomer not a ground of non-suit if it be shewn

that defendant has not been deceived and knows that the action was brought by the person who actually sues. *Copp v. Read*, 3 *Pug.* 527.

**14—Omission of material averment.**

Though the averments in the declaration are proved of a material averment, essential to the maintenance of the action, is omitted, the defendant will be entitled to a non-suit, though he might have demurred. *McPhelim v. Weldon*, 5 *All.* 358.

**Several issues—Plaintiff failing in one going to cause of action—right to have finding of jury on other issues.**

*See* Practise XIV. 17.

**Point not raised at trial—not available on argument for new trial.**

*See* New Trial III. 51.

Rule *nisi* to enter a non-suit may be remodelled. *See* Practice VIII. 19.

**NOTICE.**

**Arbitration—Notice of adjourned meeting of Arbitrators necessary.**

*See* Arbitration V. 14.

**Bail, notice of render—Reasonable time.**

*See* Exoneretur.

**Corporation—Notice of meeting.**

*See* Joint Stock Company 3.

**Calls.**

*See* Assessment.

**Instalment—Notice for payment of.**

*See* Joint Stock Company 1.

**Taxation of costs—Review—Notice.**

*See* Costs.

**Official Character.**

*See* Crown Grant I 18.

**Absconding debtor's act—effect of notice in "Gazette" as to property. [1]**

*See* Absconding Debtor 10, 12.

**Registry.**

Registry of mortgage not notice of incumbrance to a subsequent purchaser. *Doe v. Power* 1 All. 271.

**Notice to sell land under license—Posting and advertising.**

*See* Executors and Administrators V. 2.

**1—Parish School act—Assessors.**

Where assessment is made under the Parish School Act, the Assessors must give notice thereof in the same manner as in cases of assessment for county rates under Rev. Stat. cap. 53, sec. 12. *Ex parte Street*, 1 Han. 107

**2—Insolvent debtor—Order for support.**

Where the creditor's attorney was in Court. and heard the order for support made, it is not required to give him other notice. *Ex parte Jardine*, 1 Han. 572.

Publication of notice for "three consecutive days" cannot be made in weekly newspaper. *See* Costs 34 b.

**NOTICE OF ABANDONMENT.**

*See* Insurance 26.

**NOTICE OF ACTION.**

" Action at law.

**NOTICE OF APPEAL.**

" Practice V. 3.

**NOTICE OF DEFENCE.**

" Pleading III.

**NOTICE OF DISHONOUR.**

" Bills and Notes.

**NOTICE—HIGHWAYS—ALTERATION.**

" Highways 11.

**NOTICE OF MOTION.**

" New Trial I—Practice V. IX—Judgment as in case of non-suit I. 28.

**NOTICE OF SET-OFF.**

*See* Set off.

**NOTICE TO QUIT.**

*See* Landlord and Tenant.

**Mortgagor and mortgagee.**

*See* Mortgage 8.

**Remainderman, ouster by, without notice.**

The tenant of a devisee for life may, after the death of such devisee, be ousted by the remainderman without any notice to quit. *Doe d. Field v. McKay*, 2 Kerr 485.

**Determination of tenancy by notice.**

*See* Landlord and Tenant.

**NOTICE TO PRODUCE.**

“ Evidence VII.

**NOTICE BY REGISTRY.**

**Not notice of incumbrance**

*See* Supra Notice, *Doe v. Power*.

**NOTICE OF RENDER.**

“ Bail—Exoneretur.

**Escape after render and before notice.**

*See* Exoneretur.

**NOTICE OF TRIAL.**

“ Prattice V. IX.

**NOTICE—WARNING TO OBLIGORS.**

“ Principal and Surety 1.

**NOVA SCOTIA GRANT.**

**Recitals—Registry—Inquest of Office.**

*See* Crown Grant I. 16.

**NOVA SCOTIA JUDGMENT.**

**Evidence of.**

*See* Evidence II. 29.

**NOVATION**

“ Assumpsit III. 54.

**NUISANCE.**

“ Action on the Case III.—Pleading I. 50, II. 25.

**Damages—Liability.**

*See* Damages I. 21.



**RIGHT TO REMOVE.**

*See* Corporation.

**NULLITY.**

**Pleas—Treating as Nullity.**

*See* Judgment by Default—Practice.

**Execution.**

*See* Trespass V. 8.

Plea filed before appearance in a summary action is a nullity. *Andrews v. Hanson*, 1 All. 509.

**NUL TIEL RECORD.**

*See* Amendment I. 1.—Pleading II. 23.

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**OATH.**

**Necessity of shewing the taking oath of office.**

*See* Overseers of Poor.

**Defamation—Perjury—Jurisdiction to administer oath**

*See* Criminal Law II. 21—Perjury

**No complaint on oath.**

*See* Justice of the Peace IV. 16 a.

**Presumption of having taken oath.**

*See* Evidence VI. 1, 2.

**Information on oath—Necessity of.**

*See* Criminal Law I. 8.

**Requiring elector to take oath.**

*See* Election Law.

**Assignment of Perjury—Jurisdiction.**

*See* Criminal Law II 22.

**Commissioner of sewers not being sworn into office within prescribed time.**

*See* Commissioner 5.

**Information for unlawfully killing cattle.**

*See* Justice of Peace IV. 23.

**OBSTRUCTIONS.**

*See* Action on the Case.

**Right to remove.**

*See* Water Course.

Corporation—Right to remove.

**OCCUPATION.**

*See* Use and Occupation.

**Of Premises.**

*See* Insurance 19.

**Possession confined to occupation—Wrongful entry.**

*See* Possession 2—Trespass I. 24.

**Offer to suffer judgment by default.**

*See* Judgment II.

**OFFICE.**

*See* Appointment to Office.

**Appointment to—Without limitation, an appointment for life.**

*Joplin v. Davidson, Ber.* 308.

**Trustees—Filling office under act of Incorporation of Bank—Liability—Tenure of office.**

*See* Bank 3.

**Trying right to exercise office.**

*See* Quo Warranto—Mandamus.

**Swearing into office—Prescribed time.**

*See* Commissioner 5.

**OFFICER.**

*See* Government Officer—Action at Law IX.

**Proof of being—Acting as such.**

*See* Evidence VI.

**ONUS PROBANDI.**

**On claimant of timber, seized by crown.**

*See* Evidence XI. 18.

**Intoxicating Liquors.**

*See* Evidence XI, 19, 20.

**Proving property in replevin.**

*See* Pleading II. 29—Replevin 28, 24.

**Importing goods.**

*See* Custom Duties.

**Defamation—Supporting plea.**

*See* Defamation 14.

**Summary ejectment—Sufficiency of proof by landlord.**

*See* Landlord and Tenant VIII.

**Reduction of claim by proof of general average.**

*See* Evidence XI. 49. *Burpee v. Carvill.*

**Proving property to be in the Crown in action of replevin lies on the defendant.**

*See* Replevin 14.

**OPINION OF EXPERTS.**

*See* Evidence VIII. 14. 80.

**ORDERS.**

*See* Practise—Nisi Prius—Judge's Order.

**Privy Council orders.**

*See* Privy Council.

An order under the Act 19 Vic. cap. 42 requiring the gaoler to return the cause of a prisoner being detained in custody, must be made by a Judge, and not by the Court. *Chase Ex parte*, 6 All. 398.

**OUSTER.****Evidence of.**

*See* Evidence IV. 8. *Brown v. Moore*—9 *Allison v. Smith.*

**OVERFLOWING LAND.**

*See* Action on the Case. III.

**OVERSEERS OF POOR.****Not accounting for money.**

*See* Criminal Law II. 23.

**1—Necessity of shewing the taking oath of office.**

Premises in the occupation of a tenant were devised to the Overseers of the Poor of the City of Saint John, for the use of the poor. *Held*, in an action brought for the rent by the persons who were the duly appointed Overseers at the date of the will and death of the testator, and so continued until after the time of bringing the action, That it was not necessary to shew they had taken the oath of office as Overseers. *Matthew v. Chittick*, 2 Kerr 696.

**2—Personal liability.**

Where supplies were furnished to the defendant, an Overseer of the Poor, for the use of the poor of the Parish of Saint John, on orders from time to time sent by him as such Overseer to the plaintiff. *Held*, That he was personally liable for the payment of such supplies. *Gardiner v. Matthew*, 3 Kerr 601.

**3—Bringing paupers into parish—Action.**

The Overseers of the poor, not having any corporate rights, cannot maintain an action against a person who brings paupers in the Parish, who become chargeable thereon—such act being no injury to the Overseers individually. *Gillespie v. Phillips*, 5 All. 221.

**Overseers incurring liability—Bastardy bond—Action by.**

*See* Action at Law X. 6.

**OWNERSHIP OF PROPERTY.**

“ Property.

**PARCHMENT.****Sufficiency of material.**

*See Burns v. Burns*, 4 All. 229. *See* General Rules 88.

**PARISH COURTS.****Appointment of commissioner of—Not ultra vires.**

*See* B. N. A. Act.

**PARISH OFFICER.**

*See* Appointment of Officer.

**PARISH SCHOOLS.**

*See* Assessment II.

**Trustees dividing Parish — Calling meeting — Double purpose.**

A majority of the Trustees of Schools have power to divide a Parish into School Districts. *Ex parte Yeats*. 4 All. 381.

An application to Trustees to divide a Parish into School districts, and to call a meeting of the inhabitants

to determine upon an assessment under the Parish School Act 21 Vic. cap. 9, may be made at the same time ; and if, on the division of the parish, three or more of the applicants are found to be resident freeholders in the district for which the assessment is required, the trustees may call the meeting without any new application. *Ibid.*

A poll-tax may be levied under the Parish School Act. *Ibid.*

**Dismissing Teacher.**

*See* School Teacher. *See* Common School Act.

**Parol agreement.**

*See* Agreement—Contract.

**PAROL EVIDENCE.**

*See* Evidence.

**Parol gift.**

*See* Gift.

**PARTICULARS.**

**Sufficiency of bill.**

A bill of particulars which gives substantial information of the plaintiff's demand and does not confine the claim to any particular count, or mislead the defendant, is sufficient to let in evidence under any count to which the same may be applicable. *Grant v. Aikin*, Ber. 259.

The plaintiff's bill of particulars was dated at Liverpool, England, and made up in sterling money. *Held*, That without an affidavit of the defendant, that he was misled by it, it was sufficient to warrant the jury giving a sum sufficient to cover the difference of exchange. *Campbell v. Wilson*, Ber. 265.

**Defect supplied by.**

*See* Bills and Notes VI 14.

**Particulars of items in Justices Court.**

*See* Judgment by default, 9, *Jackson v. O'Donnell*.

**Demand of—Not a step in cause.**

*Johnston v. Glazier*, C. Ms. 141. *Andrews v. Hanson*, 1 All. 509.

**Signing judgment on bill—Practice City Court.**

*See City Court.*

**Recovery under Common Count—Counsel not claiming under, in opening case.**

*See Trial.*

**PARTIES.**

*See Action at Law—Husband and wife—Partnership 5.*

**PARTITION.**

A., B. and C., owned lands as tenants in common ; A. being under age her father made a partition with B. and C. in 1810 ; in 1814 A. married, still being under age, and her husband occupied the share allotted to her until his death in 1842, and six years after she objected to the partition, demanded possession of B., and brought ejectment. *Held*, That the partition having been fair she was bound by it, unless she objected within a reasonable time after her coverture ceased, and that under the circumstances six years was not a reasonable time.

*Quere*, Whether a demand of possession upon B. without any offer by A. to relinquish any part of what she was in possession of, was a sufficient notice of her dissent to the partition.

*Quere* also, Whether A.'s right was barred by the Statute of Limitations 6 Wm. IV. cap. 48, she having brought her action within ten years after her coverture ceased, and within forty years after her right accrued, though not within twenty years after she became of age. *Doe dem. Eastbrooks v. Harris*, 2 All. 42.

**PARTNERSHIP.**

**Whether contract personal or with firm—Question left to jury.**

*See Contract 15.*

**1—What constitutes partnership—Proof.**

Where J. and N. B., who carried on business as general partners, had certain mill property and transactions relative thereto, in the direction and management of which H. appeared to be taking a part, though the nature of his

agreement with J. and N. B., or his interest in the mills was not shewn; and the plaintiff, who had extensive transactions with the firm of J. and N. B., stated an account with them, whereby they admitted a balance due the plaintiff. *Held*, That H. was not jointly liable therefor, it not appearing that he was a partner in fact, or held himself out as such, and that his connection with J. and N. B., being at the most a special partnership in regard to the mills, would not make him liable for the general engagements of the firm of J. and N. B., but only for such as related to the special partnership. Circumstances which are equally applicable to a projected company, or security for past advances, are not sufficient of themselves to raise a presumption of partnership so as to create a joint liability in two persons where the credit has been given to one. *McPherson and another v. Hoskins and others*, 1 Kerr 430.

2 ————As to the sufficiency of proof of partnership this may vary according to the nature of the demand and residence of the parties. *Pollock v. Cunard*, 2 Kerr 291.

3 ————Under law allowing parties to be witnesses, it is not necessary to call plaintiff to prove partnership. See Evidence III. 9.

4 ————Evidence of a witness who had dealt with all the plaintiffs as partners and purchased goods and settled accounts with the firm for several years held sufficient to prove partnership. *Rankin et al v. Harley*, 1 Han. 271.

#### 5—Contract—Parties—Liability.

W. R., one member of a firm entered into a contract under seal, in his own name, with P., for building a vessel, which was, in fact, to be the property of the firm. After the vessel was finished, a settlement in writing of accounts took place between the plaintiff (acting on behalf of P.) and the firm, in which a balance was found due to P., which W. R., requested the plaintiff to pay. *Held*, in an action against the firm for the money paid to P., That, as it was not founded on the original agreement for the building of

the vessel, but under a separate agreement with the firm,—that they were liable. *Harris v. Robertson*, 6 *All.* 496.

**5 a—Actions by and against.**

A promise to one member of the firm to pay him for work connected with the partnership business, performed by him for the defendant, enures to the benefit of the firm; and the partner to whom the promise was made cannot sue alone. *Hartley v. Fisher*, 1 *All.* 694.

**6—Guarantee.**

A guarantee by one partner in the name of the firm for a matter not relating to the partnership business, will not bind the firm. *Marks v. Wright*, *Hil. T.* 1828.

**Pleading—Allegations—Proof—Variance.**

See Bill and Notes VI. 10, 11.

**7** ——— Non-joinder of partner can only be taken advantage of by plea in abatement. *Kelly v. Balloch*, 2 *Kerr* 699.

**8—Powers and members.**

One partner has power to compound a partnership debt, and may appoint an agent to accept a composition of such debt offered by an insolvent debtor. *Raymond v. McMahon*, 4 *All.* 524.

**9—Note given as guarantee—Authority to bind Co-partner.**

It is not incident to the general authority of a partner to bind his co-partners by giving guarantees for payment of the debts of third persons, it is therefore necessary for a person taking the note of a firm as a guarantee to prove that the partner who gave the note had authority to bind the firm in that way. *Stewart v. Parker and Fox*, 2 *P. & B.* 228.

**10—Liability of partner for wrongful acts.**

A partner is responsible for the wrongful acts of his co-partner in a matter connected with the partnership business done for the joint benefit, though he himself personally had nothing to do with the tortuous acts. *Brewing v. Berryman*, 2 *pug.* 515.



**11—Liability of partners—Credit of firm.**

F. & S. D. and B. entered into a partnership for the buying and selling of shingles. F. & S. D. to furnish the capital and B. to purchase shingles; profits to be equally divided. The shingles to be shipped to F. & S. at Boston and money provided by drafts drawn by D. upon them; the business in New Brunswick being done under the name of M. & D. Plaintiff sold goods to D. on the credit of the partnership and took his notes in payment. *Held*, That the goods being proper for the business of the firm and sold on the credit of the firm, the other partners were liable, and that as regards contracts with third parties it was of no consequence whether D. had advanced his proper share of the capital or not. *Jones v. Foster et al. impleaded with Dowling*, 1 *Han.* 596.

**Evidence of Partnership—Statement inducing belief.**

*See Evidence.*

**Statute of Limitations—Payment by one partner.**

*See Bills and Notes*. V. 26.

**Execution of deed by partner—Ignorance of co-partner.**

*See New Trial* III. 34.

**Recognition of Warrant of Attorney.**

*See Warrant of Attorney* 8—P. 416.

Plaintiff having reasonable grounds for believing that certain persons alone composed the firm. *See Pleading McDonald v. Cumming.*

**PATENT.**

If Letters Patent refer to a specification and description of the invention, as being filed in the Provincial Secretary's office, they form part of the Letters Patent, and must be produced in an action for infringement of the patent. *Lusk v. Miller, Mich. T.* 1872.

Where a Patent is claimed, not for a discovery or invention, but simply for a combination of a number of old and known materials, it is no infringement of the patent to use a part of this combination. *Ibid.*

**Statements in affidavit—Concerning.**

*See* affidavit, III. 21.

**PAWNEE.**

*See* Bailee—Trover.

**PAYMENT.**

*See* Action at Law (Former Recovery.)

**Pleading payment—Inference from receipt.**

Debt on a recognizance of bail—judgment against the principal, for £28 ; the defendant pleaded payment by the principal, and gave in evidence a receipt from the plaintiff to him for £11, “in full discharge” of the judgment. *Held*, That it could not be inferred from the receipt that this sum was a balance of the judgment after a previous payment, but that it was taken in satisfaction of the whole, and therefore the plea was not proved. *Garcelon v. Eaton*, 3 *All.* 411.

**Payment by bill—Agent authorised to receive.**

*See* Principal and Agent 8.

**Assignment—Actual payment.**

*See* New Trial II. 23.

**Payment of rent.**

*See* Landlord and Tenant.

**Payment taking case out of Statute of Limitations.**

*See* Limitation of Actions II.

**Rebuttal of presumption of payment.**

*See* Evidence VI. 7.

**Money paid under mistake.**

*See* Assumpsit III. 17.

**Appropriation—Want of Privity.**

*See* Bills and Notes V. 20.

**Application by law—Set-off—Right to show appropriation on cross-examination.**

*See* Evidence VIII. 7.

**Goods delivered.**

*Prima facie* goods delivered are not a payment, and without an agreement of some kind that they are intended

to be a payment of a debt, one party by his own act, such as tendering an account with the goods credited, cannot make them so. *Little v. Caie*, 3 *Pug.* 386.

#### **PAYMENT OF MONEY INTO COURT.**

*See Evidence X. 9, 10, 11.*

#### **PAYMENT—DEMAND OF.**

**Note payable on demand.**

*See Bills and Notes V. 11, III. 4, 15.*

#### **PAYMENT—PRESUMPTION OF.**

*See Assumpsit III. 44*

#### **PENALTY.**

**Set off**

*See Executors and Administer I. 8—Justice of the Peace—Criminal Law.*

**Negligently kindling fire.**

*See Fires.*

#### **PENDENCY OF OTHER SUIT.**

*See Pleading II. 41.*

#### **PEREMPTORY UNDERTAKING.**

*See Judgment as in Case of Non-suit.*

#### **PERJURY.**

*See Criminal Law.*

#### **Jurisdiction to take oath—Prayer Book.**

In an action for defamation, in alleging that the plaintiff was guilty of perjury on the trial of a case before two Justices of the Peace, the plaintiff cannot recover if the Justices had no jurisdiction in the case, although the words were spoken in reference to the trial where the plaintiff had given his testimony before the Justices. *McAdam v. Weaver*, 2 *Kerr* 176.

*Semble*, Perjury may be assigned where the oath has been administered on the Common Prayer Book of the Church of England. *Ibid.*

Since the passing of the Act 3 *Vic.* cap. 51, confirming the commissions already issued and authorizing the Judges

to issue commissions to take affidavits under the provisions of the Act of Parliament 29 Car. 2, cap. 5, wilful false swearing in an affidavit made in a judicial proceeding, and sworn before a commissioner so appointed, is perjury by common law. *Milner v. Gilbert*, 3 Kerr 617.

**Completion of.**

*See* Pleading I. 51.

**PERSONAL LIABILITY.**

*See* Action of Law. IX—Credit.

**PETITION (UNDER INSOLVENT ACT OF 1869).**

*See* Insolvent Act of 1869 & 1875.

**PILOT.**

**Appointment of—Removal of.**

*See* Mandamus.

**PILOTAGE.**

**Power in Corporation of St. John to make by-laws respecting.**

*See* British North America Act 1867. 5.

**PLAN.**

*See* Crown Grant—Evidence II. 1, X. 8, XI. 12.

**PLEA.**

*See* Pleading—Practice.

**PLEADING.**

I. DECLARATION—AVERMENTS—ALLEGATIONS.

II. PLEAS—SUBSEQUENT PLEADING—ABATEMENT.

III. NOTICE OF DEFENCE.

IV. MISCELLANEOUS.

I.

DECLARATION.

*See* Practice.

**1—Arguments—Allegations—Money.**

In an action to recover in this Province for goods sold and delivered in England, it is not necessary to aver in the declaration that the debt was contracted in sterling money, or the relative value of sterling and currency; and the

difference of exchange may be recovered under the common counts. *Campbell v. Wilson*, Ber. 265.

**2—Part Performance—Demand—Averment of surplussage.**

In an action of assumpsit the plaintiff averred part performance by the defendant and demand as to the residue, which was not necessary, and failed in proving both. *Held*, That both averments were surplussage. *Brown v. Frink*, Ber. 363.

**3—Insufficient Allegation—Information.**

The allegation that the goods were imported into this Province from the United States, contrary to the Acts of General Assembly, in such case made and provided, is not a sufficient allegation of an offence under 6 Wm. IV. cap. 4, sec. 4, which imposes a forfeiture of all goods which shall be landed before they are reported at the Treasurer's Office and a permit obtained, etc, and a judgment obtained on an information by the Attorney General was arrested thereon. *Attorney General v. 250 Barrels of Fish*, Ber. 419.

**4—Demise.**

A demise in a declaration of ejectment, in the name of husband and wife, of the wife's property, laid previous to the marriage, is bad. *Doe dem. Thomson and Wife v. Barnes*, Ber. 426.

**5—Special damage.**

Allegation of lose and time and expense in regaining property taken under execution, evidence of expenses in proving the plaintiff's right before a Sheriff's jury, is not admissible. *Quære*, If such expenses are recoverable at all. *Wilson v. Eills*, Ber. 324. (See Damages.)

**6—Assumpsit on guarantee—Consideration not sufficiently appearing.**

The defendant guaranteed the performance of the following agreement between the plaintiff and D., dated 10th November 1849: "Whereas B. (the plaintiff) has for some years past been acting as the attorney and agent in this Province for D. of London, in the general management of

the Lancaster Mills ; and whereas the said D. has seen fit, by letter of attorney bearing date the 19th September last, to appoint G. (the defendant) his attorney and general agent in this Province, and has thereby revoked all power and authority heretofore given to the said B. ; and whereas an action of trover has been commenced and is now pending against the said B. at the suit of W. and C. for the value of a quantity of logs which they allege to have been converted at the Lancaster Mills, for the value of which logs (if any) the said B. should not be held personally liable ; in consideration of the foregoing premises, it is agreed by the said D. to indemnify and keep harmless the said B. from all damages, costs and charges that may be awarded against him, or that he may be put to in his defence of the said action." Declaration thereon, stating that whereas before making the defendant's promise, to wit, on etc., the plaintiff was the general agent of D. in this Province, in the management of the Lancaster Mills, that an action of trover had been commenced and was pending at the suit of W. and C. for the value of a quantity of logs which had been taken by the plaintiff as the agent, and acting under the directions of D., and in the belief that they were his property, and that D. had requested the plaintiff to defend said action ; and whereas D. was desirous of revoking the power of the plaintiff as his agent, and of appointing the defendant and the defendant was desirous of succeeding the plaintiff in such agency ; that the plaintiff agreed with D. to defend said action, and retire from the agency and allow the defendant to succeed him therein, in consideration of receiving the agreement of D. to indemnify the plaintiff against all damages, costs and charges he might be put to in the defence of the action of W. and C. ; and also in consideration of receiving the guarantee of the defendant for the due performance by D. of his agreement ; that D. did, on the 10th November 1849, agree to give such undertaking, and thereupon in consideration of the premises, and that the plaintiff would accept the agreement of D. and act upon the same, and would defend the said action, and

would retire from the said agency and permit the defendant to assume the duties thereof, the defendant undertook and guaranteed to the plaintiff the performance of D's agreement. *Held*, That the consideration did not sufficiently appear by the agreement, to support the declaration. *Beattie v. Garbutt*, 3 All. 1.

**7—Proceedings of record—Slander—Allegation of necessary facts.**

Where, to an action of slander, the defendant pleaded the Statute of Limitations, and the plaintiff replied that a previous action was brought within due time for the same slander, in which he had obtained a verdict, and the Court had ordered the judgment to be arrested, (setting out the proceedings of the Court as matters *in pais*, without any *prout patet per recordum*,) and that the same action was brought within a year of such arrest of judgment, concluding a verification in the ordinary form. Rejoinder, That there is not any record of the several proceedings (setting them out *seriatim*); sur-rejoinder, a mere repetition of the replication; upon demurrer thereto, the Court were of opinion that the proceedings in the former action and arrest of judgment must be entered of record and pleaded as such, with a *prout patet*, and that the replication was therefore bad, but under the circumstances permitted the plaintiff to amend on payment of costs. *Beardsley v. Diblee*, 1 Kerr, 642.

**8—Limit bond—Assignee—Allegation.**

Summary action of debt by assignee of a limit bond; on demurrer—*Held*, 1st. That *nil debet* might be pleaded under the Act of Assembly as the general issue; 2nd. An averment, that the assignee is the plaintiff in the original suit in which the limit bond was given is not essential; 3rd. A breach of the condition of the bond is sufficiently alleged by the words "of which the said J. R." (the principal in the bond) made default. *Maxwell v. Roe*, 2 Kerr 69.

**9—Assignee of limit bond—Plaintiff in original suit—Must be apparent on the record.**

In an action by the assignee of a bond for the gaol

limits, it is a fatal objection, even on motion for arrest of judgment after verdict, that it does not appear on the record that the assignee was the plaintiff in the suit on which the bond was taken, there being nothing to render proof of that fact necessary on the trial of the issue. *Semble*, The declaration should state the writ on which the defendant is in custody when the limit bound is taken. *Cameron v. Beardsley*, 2 Kerr, 598.

**10—Award—Non-fulfilment—Indenture.**

Where, by the condition of an arbitration bond the award is directed to be in writing, indented under the hands and seals of the arbitrators; in an action on the bond for non-fulfilment of the award, the declaration not averring that the award was indented: held bad on special demurrer. *Coburn v. Taylor*, 2 Kerr 120.

**11—Deed—Setting out.**

In pleading a grant or bargain and sale, the deed should be set out. *Ansley v. Peters*, 2 Kerr 598.

**12—Assault and battery—General replication.**

In trespass for assault and battery; the defendants pleaded *molliter manus imposuerunt* in defence of their wharf and close, on which the plaintiff had unlawfully placed a ladder, which he was endeavouring to maintain there by force, whereupon, etc. *Held*, That an issue, joined on the general replication *de injuria* to this plea, only involved the question as to the defendant's possession of the wharf and close whereon it stood; and the assault being made in defence of such possession against the plaintiff's unlawful entry, etc., and that the Judge was not warranted in directing the jury to find for the plaintiff, if, notwithstanding these facts, it appeared there was another piece of land adjoining the wharf also in dispute, from which the defendants were endeavouring to remove the plaintiff, and that the assault was partly committed with that intent, and that this piece of land was not in the defendants' possession; the plaintiff to have availed himself of this matter should have replied specially or new assigned. *McCulley v. Cunard*, 2 Kerr 181.



**13—Sureties on bond—Clerk—Non-damnificatus.**

The by-laws of a banking company required that the directors should inspect the vaults and take an account of the cash, etc., once a month: in an action against the sureties on a bond given for the good conduct of a clerk in the bank, the defendant pleaded that the bond was executed upon the faith that the plaintiffs would faithfully observe the by-laws, and averred that they had neglected to do so. *Held*, bad. *Held* also, That *non-damnificatus* was not a good plea to an action on such bond. *Bank of New Brunswick v. Wiggins*, 2 Kerr 478.

**14—Debt for penalty—Uncertainty.**

To a declaration in debt for the penalty of a bond entered into by the defendants, K. and W., to the plaintiffs (a company incorporated by the Act of Assembly 5 Wm. IV., 2nd session, cap. 10), conditioned for the faithful performance of K.'s duty as secretary to the company without embezzling, etc., and for due accounting upon notice so to do, or making satisfaction for any loss within three months after proof thereof and notice. The defendant W., after setting out the condition of the bond on oyer pleaded 1st. *non est factum*. 2nd. That if K. did not faithfully perform his duty or failed to account, notice thereof was not duly given three months before the commencement of the suit. 3rdly. That if the plaintiffs were damnified it was of their own wrong. 4thly. After setting out a clause in the Act of Incorporation prohibiting the company from trading in gold and silver coins, etc., the plea alleged generally that the company did after the act of incorporation and the execution of the said bond, trade in gold and silver coins, etc., and employ their secretary K. therein, whereby K.'s responsibility was increased. *Held*, on demurrer, That the 2nd 3rd, and 4th pleas were all bad; the 2nd, as hypothetical, neither traversing or confessing anything; the 3rd, being in the nature of *non damnificatus*, and not alleging performance of the condition, could not be pleaded to a bond of this sort; and the 4th, as not pleaded with sufficient certainty, nor answering

all the breaches which might have been assigned, if the defendants had pleaded performance. *Mechanics' Whale Fishing Company v. Kirby*, 2 Kerr 646.

15 ——— K. and W. entered into a bond to the plaintiffs conditioned that if K. should at all times faithfully serve the plaintiffs while he continued in their employ as their secretary, without consuming, wasting, embezzling, etc., their moneys, goods, etc.; and should at any time while secretary neglect or refuse to account with the plaintiffs when required by reasonable notice in writing; and if K. and W., or either of them, should within three months after due proof thereof, either by confession of K. or otherwise, and notice thereof in writing given to K. and W., or either of them, make satisfaction and payment to the plaintiffs for the moneys, goods, etc., so wasted, etc., and also for all such loss or damage as the plaintiffs might sustain by reason of K.'s neglect or refusal to account, then the obligation to be void. *Held*, That the clause providing for proof and notice restrained the preceding clause, and that the defendants were not chargeable on the bond in any case until after proof and notice. *Held* also, That to make out a breach for not accounting, notice to account should have been given to K. while he was secretary. *Mechanics' Whale Fishing Company v. Whitney*, 8 Kerr 118.

To an action on this bond, the defendants pleaded a general performance; the plaintiff's replied, assigning as a breach that K. while secretary embezzled and unlawfully made away with large sums of money of the plaintiffs, and that proof was made thereof, and notice given to W.; the defendants rejoined that no due proof of the embezzling, etc. was made, and no due notice given to W. *Held*, bad, as a departure from the plea; and that the want of proof and notice were matters for separate pleas. *Ibid*.

A further breach assigned was, that K. while secretary, made false enteries and fraudulent charges in the plaintiffs' books, whereby they sustained loss. *Held*, That this was not a breach of duty within the terms of the bond, unless in consequence the plaintiffs' moneys were wasted etc., which should have been alleged. *Ibid*.

**16**———To an action on a surety bond, conditioned *inter alia* for the faithful performance of the principal as secretary to the plaintiffs, and the making of satisfaction for any losses, etc., within three months after due proof thereof and notice—the surety in his fourth plea averred performance up to a certain period, and as an excuse for the subsequent non-performance alleged a dealing by the plaintiffs in gold and silver coins contrary to law, which increased the risk, whereby the surety was discharged; and in his fifth plea alleged that no due proof was made three months before the action; and the plaintiffs in their replication to the fourth plea traversed the dealing in gold and silver, and then assigned several breaches on divers days between periods which embraced not only that time in the pleas covered by the performance, but also that during which the breach was admitted; and in the replication to the fifth plea took issue thereon in the words of the plea. On demurrer to each of these replications and joinders therein, with objections to the adverse pleading in reference to form—*Held*, That the replication to the fourth plea should not have assigned, but suggested breaches, and confined them to the period for which the surety had pleaded performance, and should have concluded the traverse of the surety's excuse of non-performance with an issue to the country, and that consequently this replication was ill. *Held* also, that the replication to the fifth plea, taking issue thereon in the words of the plea, was sufficient. *Held* also, that where one party demurs to any pleading, the only objection which the other party can make to the former pleadings are those which go to the substance, not the form of such pleadings. *Mechanics' Whale Fishing Company v. Whitney*, 3 Kerr 312.

**17—Contract—Variance—Condition precedent.**

Where part of the contract stated in the declaration was in consideration that the plaintiff would sell and deliver to the defendant, certain supplies which he might from time to time require to enable him to get logs, and this was succeeded by an averment that the plaintiff sold and

delivered to the defendant such supplies as he from time to time required, and demanded of the plaintiff, and it appeared in evidence that the agreement was for supplying only particular articles, which were specified, and that on application by the defendant to the plaintiff for some of the articles, he was unable to furnish them. On motion for a non-suit on the ground of variance, *Held*, That there was a clear variance between the agreement alleged and the one proved. *Held* also, That under the agreement it was a condition precedent that the plaintiff should supply to the defendant the articles agreed for, and the defendant having made default in so doing was not entitled to recover. *Reade v. Ashe*, 3 *Kerr* 327.

**18—Assumpsit by administrator—Promises.**

In a summary action of assumpsit by an administrator for the work and labour of the intestate, the promise was laid to the plaintiff as administrator only, but no proof thereof given at the trial; on the point reserved for a non-suit, verdict for the plaintiff, and rule *nisi*. *Held*. That the promise was material and in issue, and not having been proved, a non-suit should be entered. *Stephenson v. Perley* 3 *Kerr* 398.

**19—Promises by testator—Foreign judgment.**

In assumpsit against an administrator *cum testamento annexo*, on promises by the testator. and on a judgment against the executors in Jamaica, the defendant pleaded—first, the general issue; secondly, to the counts on promises by the testator, a judgment recovered against the executors in Jamaica for the same cause of action; thirdly, *plene administravit* before the defendant had notice of the plaintiff's claim. *Held*, on demurrer, That the first plea was good, as it answered all the promises, express or implied, alleged to have been made by testator or defendant; that the second plea was bad, because a foreign judgment is not a debt of record, but only evidence of a debt, and the simple contract debt on which it is founded is not merged in it: and that under the Act 7 Vic. cap. 41, the third plea was good, without stating that the assets were exhausted after the expiration of eighteen

months from the granting of administration. *Held* also, That it was not necessary for the defendant to plead he had fully administered before notice of the plaintiff's demand, to executors in Jamaica. *Fergus v. Wardlaw*, 3 Kerr 665.

#### **20—Bail Bond—Discontinuing Suit.**

A plea to an action on a bail bond, that before the return and filing of the writ and entry of the cause, if any such filing and entry was made, the plaintiff discontinued his suit, is bad: 1st. Because the discontinuance should have been alleged as the judgment of the Court, and the manner of making it stated; and 2nd. Because the filing of the writ being stated hypothetically, did not confess and avoid the effect of it. *Bacon v. Johns*, 1 All. 257.

#### **21—Agreement—Breach—Second agreement—Assent.**

The defendant made an agreement to deliver plaintiffs at S. a cargo of deals for a vessel, which he failed in performing; he afterwards agreed to pay the plaintiffs £60 for the loss sustained in not having the cargo of deals ready for the vessel at S. The second agreement was not signed by the plaintiffs, but was in their possession. *Held*, That the plaintiff's possession of the agreement was *prima facie* evidence of their assent to it, and that upon a count setting out the first agreement and the breach thereof by the defendant, and the agreement to pay £60 sterling in satisfaction of the damage occasioned by such breach, the plaintiffs were entitled to recover the £60. *Holderness v. McGhie*, 1 All 429.

#### **22—Trespass—License.**

In trespass for breaking the plaintiffs close, subverting the soil, covering the surface with dirt, etc., and digging and carrying away coal; the defendant pleaded. 1st Not guilty: 2nd. That the Queen being seized in fee of all mines of gold, silver, copper, lead and coals, in the close, *with the appurtenances*, granted a license to defendant to make use of, and dispose of the produce of all the said mines which he might discover and commence the working of: under which acts he justified the acts complained of, as necessary to getting the coal—doing no more damage to the close than was absolutely necessary to the effectual

working of the mine. Replication, traversing the Queen's seisin of the mines with the appurtenances, *modo et forma Held*, 1st. That by the term *appurtenances*, could not be intended such a seisin as would enable the Crown to grant a license to the defendant to use the mine in the manner pleaded, but only such rights as were necessarily incident to the seisin of the mines; but the Queen being seized of the mines, the finding on this issue must be for the defendant. But, 2nd, That as the plea confessed the acts complained of, and contained no legal justification, the plaintiff was entitled to judgment on the whole record, *non obstante veredicto*. *McMahon v. Berton*, 2 All. 321.

**23—Assumpsit—Agreement—Performance—Deviation  
Condition precedent.**

B. agreed in 1836, to survey at the landing and take delivery of all the spruce and pine logs the plaintiff might cut and haul to the landings at Taxis river, and pay him a certain sum per thousand for all the merchantable logs as soon as he had driven them past the mouth of Clearwater brook, (a tributary of Taxis river). After some of the logs had been driven, B. made an examination of the remainder then lying in the river, sawed some of them into deals, and made an estimate therefrom of the contents of the whole, taking the statements of the parties who cut them as to the quantity, without making any measurement. A partial settlement was made, upon which the plaintiff brought an action against B. on the agreement, and in 1838, while the suit was pending and while a quantity of the logs still remained undriven, the defendants agreed in consideration of the plaintiff's discontinuing the suit, "to pay him the balance that might be due him from B. on account of logs to be furnished by him to B. as per agreement and settlement, when the whole of the spruce and pine logs then remaining in Hovey brook and Taxis river were driven down past the mouth of Clearwater brook." The plaintiff did not drive all the logs, but in a settlement between him and B. in 1843, in which the former estimate of the quantity of logs were taken. B. made

a deduction from the plaintiff's account of about 20 M. feet of logs, a supposed quantity still lying in Taxis river, and struck a balance in favour of the plaintiff of £315, including £48 interest; this balance was demanded from the defendants. In an action on the second agreement the declaration averred (*inter alia*) that on the 1st July, 1839, the spruce and pine logs, which at the time of the agreement were remaining on Hovey brook and Taxis river, were driven down past the mouth of Clearwater brook, agreeably to the spirit and effect, true intent and meaning of the agreement; and that afterward by an account stated between the plaintiff and B. there was a balance of £315 due from B. to the plaintiff on account of the logs, of which the defendants afterwards had notice. *Held*, 1st. That as the settlement referred to was a future one, the agreement between the plaintiff and B. should have been set out in the declaration, in order to shew that a settlement was subsequently made between them, and that it was such as to be binding on the defendants according to their agreement with the plaintiff; or if the defendants were liable without such settlement, to shew how they became liable. 2nd. That the driving the whole of the logs past Clearwater brook was a condition precedent to the plaintiff's right to recover, performance of which should have been proved, or a sufficient excuse shewn for the non-performance. 3rd. That the averment of driving the logs according to the spirit and effect, etc. of the agreement, was an averment of performance. 4th. That as the plaintiff and B. had deviated from the mode agreed upon for ascertaining the quantity of logs, the defendants would not be bound by the settlement unless they had notice of the deviation before they entered into the agreement, or subsequently assented to it. 5th. That admitting the quantity of logs to have been properly ascertained, the defendants could not be liable for interest until default made in paying the principal; and they were not liable for the principal because the correct balance was never demanded. *Sutherland v. Gilmour*, 2 All. 481.

Application of the maxim *de minimis non curat lex*. *Ibid*.

**24—Assumpsit—Agreement—Averment—Amendment.**

In an action for not delivering deals according to contract, the declaration stated that the defendant was in the possession or occupation of a saw-mill at W. and engaged in the manufacture of lumber at such mill, and had agreed to deliver the plaintiff a quantity of deals as they came from the mill, and that if any accident happened to the said mill so that the deals could not be cut the contract was to be void; averment that no accident happened to the said mill. The contract did not specify any particular mill, and the only mill in the defendant's possession was injured and prevented from sawing. *Held*, That the averment was material, and that the plaintiff could not shew that another mill, not in the defendant's possession, was the one intended by the contract. *Holderness v. Welling*, 2 All. 572.

*Held* also, That if the declaration was amendable as to the description of the mill, the amendment could only be made at the trial. *Ibid*.

**25—Debt for legacy—No allegation of receipt of money.**

Declaration stated that A. bequeathed to the plaintiff one-fourth of £200, which would be due from B. after A's death, according to an obligation held by A. at such time and to such persons as he should appoint by will for payment thereof; that A. by his will directed that B. should pay £50 pound per annum for four years to A.'s executor, until the £200 was paid; that he appointed the defendant his executor, and that more than four years had elapsed since the death of A. *Held*. Bad for not averring that the defendant had received the money from B. *Brown v. Harding*, 8 All. 249.

*Quære*, Whether, if the defendant had received the money, he would be liable in his representative character. *Ibid*.

**26—Assumpsit—Warranty—Payment by note.**

In action for breach of warranty on the sale of goods, the declaration stated that payment was to be made by a note at three months from the plaintiff to one of the de-



fendants, but the evidence did not shew whether the note given was drawn in favor of one or both defendants. *Held*, 1st. That being left doubtful by the evidence, it might be presumed that the note was given in accordance with the agreement as stated in the declaration; 2nd. That if it had appeared that the note was to be given to both defendants, the declaration might have been amended. *Lyman v. Cain*, 3 *All.* 259.

**27—Covenant—Averment—Readiness—Ability.**

In an action on an agreement whereby the plaintiff was to deliver the defendant, on or before the 1st December 1854, at such landing place at Saint John as the defendant might direct, 500 M. feet of deals, to be paid for on delivery, the declaration alleged that on the 30th November 1854, the plaintiff was ready and willing, and offered to deliver the deals at such landing place at Saint John as the defendant might direct; but that the defendant refused to accept the deals or to appoint any landing place where they might be delivered, or to pay the plaintiff for them at the price agreed. *Held*, That under the averment of readiness and willingness, the plaintiff was bound to prove his ability to deliver the deals, though the defendant had broken the agreement by refusing to take any deals but such as were sawn at a particular mill, and by neglecting to appoint a place for the delivery. *Taylor v. Travis*, 3 *All.* 445. *See Nos.* 67--68.

**28—Contract and proof—Variance.**

Declaration stated that defendant sold plaintiff 500 M. feet of pine logs, to be delivered at such reasonable time thereafter as the plaintiff should require; breach—that though a reasonable time had elapsed, the defendant had refused to deliver the logs to plaintiff on request. The contract proved was for the sale of 500 M. feet of logs in the defendant's boom at Union Point, marked B., to be selected and scaled by G. when required by plaintiff, and to be delivered in the spring following the date of the agreement. *Held*, That there was a variance between the contract set out and the proof. *Cushing v. Goddard*, 3 *All.* 595.

**29—Description of plaintiff—Representative character—Surplusage.**

Plaintiffs, assignees of L., F. & Co., under a trust deed of assignment, sued on a contract made by the defendant with L., F. & Co., the declaration stated that "J. M. and A. F., assignees of the estate of L., F. & Co., complain," etc. *Held*—(Parker, J., *dissentiente*) That the declaration did not set out a right of action accruing to the plaintiffs in their representative character, and that the words "assignees," etc., were mere surplusage. *McMillan v. Chamberlain*, 4 All. 187.

**30**——Plaintiffs not being clothed with any official character as trustees, should not declare in that capacity, but allege it as matter of description. *Burnham v. Watts*, 2 Kerr 377.

**31—Special counts—Proof.**

Holder of bill of exchange, relying on no funds in hands of drawee as an excuse for not presenting bill, and giving notice, such fact should be stated in the declaration; averments must be proved to entitle plaintiff to recover on special counts. *See Bills and Notes VI. 12.*

**32—Obligors—Bond to A. or B. or either.**

A bond conditioned for the payment of money to A. and B., or either of them, cannot be sued in the name of one of one of the obligees, unless the other is dead. *Hazen v. Drummond*, 4 All. 267.

**33—Policy of insurance—Condition precedent—Want of averment.**

The following clause in a marine policy of assurance, viz.: "and in case of loss, such loss to be paid in sixty days after proof of loss and adjustment, and proof of interest in the said assured," has the operation of a condition precedent; and the judgment was arrested in an action by the assured against the insurer for the want of any averment in the declaration, that such preliminary proof had been furnished to or dispensed with by the defendant. *Watson v. Summers*, 2 Kerr 101.

**34—Corresponding proof—Description.**

Where in replevin the place of taking is described not by name but by abuttals—*Held*, That it is not necessary on the plea of *non cepit* that the place should be proved to be in one occupation, and that the calling it a "close," where different parts of the land within the abuttals are held by several parties, is not material, the defendants not having been misled by the generality of the description. *Mills v. Dewitt*, 1 Kerr 486.

**35—Administration bond—Necessary Statement.**

In an action on an administration bond under the Act 3 Vic. cap. 61, assigning as a breach a devastavit by the administrator, it must be stated that the estate of the intestate has sustained injury thereby to a certain amount. *Sherlock v. McGee*, 1 All. 346.

An allegation in the assignment of a breach that goods and chattels came to the hands of the defendant as administrator, necessarily shews that they were the goods of the intestate. *Ibid*.

**36—Inferior Court—Claim arising within jurisdiction—Proceedings.**

In declaring in the inferior Court of Common Pleas, it is not necessary to allege that the demand arose within the jurisdiction of the Court. *Stephenson v. McLelland*, 1 All. 19.

In an action on a judgment obtained in the Court of Common Pleas, it is sufficient to state the recovery of the judgment, without setting forth the prior proceedings. *Ibid*.

**37—Policy—Insurance—Conditions—Averments.**

In a fire policy, the insurers by an endorsement thereon, consented that the loss should be payable to the order of W. *Held*, Sufficient in a declaration in covenant on the policy to allege that the loss was not paid to the plaintiff nor to W.; and that as such indorsement gave W. no legal interest in the property, it did not preclude the assured from maintaining an action in his own name; nor was it necessary to aver any order from W. in favor of the assured. *Ketchum v. The Protection Insurance Co.*, 1 All. 186.

By the tenth condition attached to the policy, it was stipulated "that in the event of a loss the assured should deliver to the insurers a particular account in writing, signed with his own hand, and verified by his oath, and that he should also declare on his oath whether any or what other insurance had been made on the property insured, and in what general manner (as to trade, manufactory, merchandise, or otherwise) the building containing the property insured, and the several parts thereof, were occupied at the time of the loss, who were the occupants of such buildings, and when and how the fire originated, as far as he knew or believed, and that the assured should procure a certificate under the hand and seal of a magistrate or notary public (most contiguous to the place of the fire, and not concerned in the loss as a creditor, or otherwise related to the assured), that he had made due enquiry into the cause and origin of the fire, and also of the property destroyed, and was acquainted with the character and circumstances of the assured, and did verily believe that assured really and by misfortune, and without fraud or evil practice, sustained by such fire loss or damage to the amount specified." The declaration stated the fire to have happened on the 29th July 1845, and that the compliance with this condition, in respect of notice of the fire, took place on the same day; as to the delivery of a particular account in writing, on the 20th August 1845; and in respect to the declaration on oath, the 27th March 1846. *Held*, Sufficient, the respective times having been laid under a *videlicet*; the performance of these acts, whether in due season or not, being matter of evidence. *Held*, also, That as W. had no legal interest, it was not necessary to state that he was not related to the notary. *Ibid*.

By the fifteenth condition annexed to the policy, it was declared "that no suit or action of any claim under the policy, should be sustained in any Court of law or Chancery, unless such suit should be commenced within the term of twelve months next after the cause of action accrued," etc. *Held*, That this was a condition subsequent—the subject of a plea. *Held* also, That an allegation in a count upon a

policy containing this condition, that the insurers had no mayor, president, etc., upon whom process could be served (introduced to anticipate a probable objection that the action was not brought within the twelve months,) was mere surplusage. *Ketchum v. The Protection Insurance Co.*, 1 *All.* 136.

The preliminary proof required by the tenth condition may be waived, and being a question of fact, the mode of waiver need not be tested. The fifteenth condition being the subject of a plea, an averment in the declaration that the insurers had waived it, would not be traversable; therefore it might be passed by without notice. *Held* also, That it could not be waived—the lapse of time extinguished the liability of the insurers, which could not be revived by waiver; but *Semble*, That they might dispense with the condition by deed, and if a deed could avail as a dispensation it should be replied to a plea of the condition. *Held* also, That the fifteenth condition was valid in law, and operated as an effectual bar everywhere; therefore a plea of the fifteenth condition to a count containing an averment of waiver of this condition is properly pleaded. A replication to such a plea, that the defendants were a foreign corporation, and that no action could have been sustained within the twelve months, unless they had voluntarily appeared, and there was no means of compelling their appearance, although the plaintiff was willing to prosecute within the twelve months, is bad, as it neither confesses nor avoids anything material, for the plaintiff might have sued out process within the twelve months, or the defendants might have been sued in the country where they are incorporated, and they are not estopped by voluntarily appearing, from setting up the lapse of time as a defence. *Ibid.*

A plea, embodying the tenth condition, which stated that, after the fire, to wit, on the 26th August, 1845, the plaintiff was required by the defendants to deliver an account in writing under his hand, verified by his oath and by his books of accounts, etc., and permit extracts,

etc., to be taken respecting the loss, etc., and the plaintiff refused, is not double, as they all go to establish one point—the non-performance by the plaintiff of that part of the tenth condition. *Ketchum v. The Protection Insurance Co.*, 1 *All.* 186.

A traverse in a plea that the plaintiff was not interested in the goods insured to the whole amount of their value, is too large; for if he was interested in any part, he is entitled to recover *pro tanto*. *Ibid.*

To a declaration, which averred performance by the plaintiff of all the acts required by the tenth condition to be performed by him, a plea traversing the performance of all these acts, is good, according to the rules of pleading at common law. *Ibid.*

A plea which first traverses an allegation in the declaration of the delivering an account of loss according to the tenth condition, and secondly, sets up fraud, is unobjectionable. 'The refusal to deliver an account in such case is indicative of fraud, and is consistent with the general charge of fraud subsequently made. *Ibid.*

A plea alleging false swearing in a statement, A. annexed to the declaration of loss made by the plaintiff, is bad, for not averring that any such statement was annexed, and for not shewing when and before whom the oath was made, or in what particular the statement was false. *Ibid.*

**38—Claim for total loss—Right to recover for partial loss—Deviation—Right to recover where loss payable to plaintiff.**

*See Insurance 41.*

**39—**The assignee of a policy of insurance and of the property insured, does not by such assignment, acquire any right of action against the insurer of the original contract, though the assignment is made with his consent, and in accordance with one of the conditions of the policy; but a new promise by the insurer, supported by a valid consideration, to give the assignee the benefit of the insurance, will support an action. The declaration in an action

by the assignee of a policy of insurance made by the defendant with A., after setting out the policy, the payment of the premium by A., and his assignment to the plaintiff with the defendant's consent according to one of the conditions of the policy, whereby the defendant was released from liability to A., stated, that in consideration that the plaintiff, at the request of the defendant, had undertaken and promised the defendant to perform all things in the policy contained on the plaintiff's part to be performed in pursuance of the consent to assign, and in consideration of the assignment of the property from A. to the plaintiff, and the release thereby of all liability of the defendant to A., and of the assignment of the policy with the defendant's consent, and in consideration of the payment of the premium so received as aforesaid, the defendant promised the plaintiff to be the insurer to him, etc. *Held*, That there was not a sufficient consideration shewn to support the defendant's promise. *Demill v. The Hartford Insurance Company*, 4 All. 341.

The receipt of a renewal premium on the policy by the insurer from the assignee, is a sufficient consideration for a new promise by the insurer to the assignee. *Ibid*.

One of the conditions of a policy declared that if the insured should thereafter make any other insurance on the property, and should not, with all reasonable diligence, give notice thereof to the insurer, and have the same endorsed on the policy or otherwise acknowledged in writing, the policy should cease and be of no further effect; and if any subsequent insurance should be made, which with the sum already insured, should in the opinion of the insurer amount to an over-insurance, he should have the right of cancelling the policy by paying to the insured the unexpired premium *pro rata*. In an action on a policy where there was a subsequent insurance, the declaration averred that notice thereof was forthwith given to the insurer (the defendant), and it thereby became his duty to indorse such subsequent insurance on the policy, or to acknowledge the same in writing, but that he neglected and

refused so to do. *Held*, on demurrer, That the declaration was sufficient, and that a tender of the policy to the insurer for indorsement, or a request to him to indorse or acknowledge it in writing, was not necessary. *Demill v. The Hartford Insurance Company*, 4 All. 341.

*Quere*, Whether the defendant could be charged with a breach of duty in not indorsing the subsequent insurance, unless the policy was tendered to him for that purpose ; but *Held*, That the averment that it was the defendant's duty to indorse it, might be treated as surplusage. *Ibid*.

#### **40—Consideration moving from plaintiff.**

A declaration in assumpsit upon an agreement or note, whereby the defendant "in consideration of value received from the estate of J. & H. K. promise to pay the plaintiffs, trustees of the said estate, £986 in cash or sole leather on or before 1st May, 1843," is not bad on general demurrer, on the ground that the consideration did not move from the plaintiff, or that no demand of payment was averred specially. *Burnham v. Watts*, 2 Kerr 377.

#### **41—Averment of consideration—Proof.**

In an action on a written memorandum, whereby "A. for value received promises to pay B. \$759 in current bank bills," it is not sufficient to allege the consideration in the general terms of the memorandum, but the plaintiff must state in what the value consisted as the consideration for the promise. *Whitney v. Marks*, 1 Kerr 137.

**42**——It is necessary also not only to allege the actual consideration, but the proof must correspond with the allegation. In this case the plaintiff alleged that the consideration consisted of *certain standing trees, goods, wares, and merchandize, and stumpage* ; the evidence shewed the consideration to consist of stumpage alone. A verdict having been taken for the plaintiff, subject to a motion for a non-suit, the Court allowed the plaintiff to amend on payment of all costs, and made the rule absolute for a new trial instead of a non-suit, on the condition of the payment of such costs. *Whitney v. Marks*, 1 Kerr 179.



**43—Debt on bond—Award—Breach.**

In an action on a bond conditioned for the performance of an award, the particular breach relied on must be stated in the declaration: it is not sufficient to state generally that the defendant refused to comply with the award, and would not perform the acts on his part to be performed according to the directions of the award. *Burgoyne v. Burgoyne C*, *Ms.* 120.

**44—Assumpsit on note—Partnership.**

In an action by the payees against the maker of a promissory note payable to A., B., C. and D., the declaration alleged that the defendant promised to pay the plaintiffs, by the name, style and firm of A., B., C. and D. *Held*, That it was not necessary to prove that the plaintiffs were partners, and that the words "name, style and firm" might have been struck out of the declaration. *Allen v. McNaughton*, 4 *All.* 234.

**45**———Averment of rate of exchange and place. *See* Bills and Notes I, 4.

**46—Consideration—Averment—Alder by verdict.**

The declaration stated, that whereas the plaintiff had the custody of certain timber of the defendant, and the defendant had bargained with one J. M., to sell and deliver to him a certain quantity of timber, and thereupon in consideration that the plaintiff at the request of defendant would agree to deliver to J. M. 573 tons of timber, averaging in size  $18\frac{3}{4}$  inches, the defendant promised the plaintiff that his timber in the plaintiff's custody should be of sufficient size to enable the plaintiff thereof to deliver J. M. the said 573 tons of the average size aforesaid; but if the timber should prove of insufficient size, he (the defendant) would pay the plaintiff such loss as he might sustain by reason of the timber being of insufficient size, to enable the plaintiff thereof to comply with his agreement with J. M. The declaration then proceeded to aver that although the plaintiff did on, etc., at etc., agree to deliver J. M. 573 tons of timber of the average size of  $18\frac{3}{4}$  inches, and although the defendant's timber in the plaintiff's custody did not average  $18\frac{3}{4}$

inches, but only  $13\frac{1}{4}$  inches, and the plaintiff had by reason thereof sustained great loss, and was forced and obliged to pay J. M. a large sum, viz : the difference in value between timber of  $13\frac{3}{4}$  and timber of  $13\frac{1}{4}$  inches average ; yet the defendant, although requested, had not paid the plaintiff the amount of the loss, etc. *Held*, on motion in arrest of judgment, That there was a sufficient consideration alleged, and that it was not necessary for the plaintiff to aver that he had performed the contract made by defendant with J. M. by delivering timber of the average size specified, the agreement by plaintiff to deliver and not the delivery itself forming the consideration for the defendant's promise to indemnify. *Cunnard v. Plummer*, 2 Kerr 418.

*Held* also, That after verdict neither the mode of alleging the consideration, nor the want of averment of notice to the defendant of J. M.'s demand on the plaintiff, could be objected to. *Ibid*.

**47**——Insurance policy—Meaning of words by usage of trade. *Held*, that such usage and construction should be averred in the declaration. *See Insurance 21*.

**48**—Libel—Prefatory averments—When necessary. **1**

In a declaration for a libel, prefatory averments are not necessary, where the charge is apparent on the face of the paper without reference to extrinsic facts. The question after verdict is whether enough appears on the record to sustain the action. *Connick v. Wilson*, 2 Kerr 617.

**49**—Assignee of term.

A party signing as assignee of a term on a covenant contained in the lease and alleging and making profert of an assignment by deed is bound to prove it, and if several assignments are alleged, a traverse that the plaintiff became entitled *modo et forma*, puts the whole of them in issue. *Ansley v. Peters*, 1 All. 339.

**50**—Case—Nuisance—Erecting steam mill—Surplusage.

In an action on the case for a nuisance for erecting a steam mill on land adjacent to plaintiff's dwelling house, the evidence of persons living in other adjoining premises

as to the injurious effect of the steam mill upon them, is admissible in order to shew by necessary inference the damage done to the plaintiff by the erection. No other damage need be shewn than the abridgement of the plaintiff's enjoyment in the occupation of his premises. The judgment will not be arrested because in one or more of the counts annoyance to the plaintiff's tenants as well as to himself and family is alleged. It will be deemed surplusage. *Barlow v Kinnear*, 2 Kerr 94.

#### 51—Perjury—Averments.

The introductory averment in a declaration in an action for slander, containing twenty-three counts, stated that before the committing of the grievances mentioned in certain counts (including the eighteenth) the plaintiff had been duly sworn to a certain affidavit made in the Supreme Court before a commissioner duly authorized, concerning certain proceedings in a suit pending in such Court, and that he had been duly sworn to the truth of the matter in such affidavit contained, and that the defendant intending it to be believed that the plaintiff had been and was guilty of perjury, etc., spoke and published, etc. The eighteenth count stated that in a certain discourse which the defendant had concerning the plaintiff, and of and concerning said affidavit so made by the plaintiff as aforesaid, the defendant further contriving and intending as aforesaid, in the presence and hearing, etc., spoke and published of and concerning the plaintiff, and of and concerning the said affidavit, etc., the false, scandalous and malicious words following, "Mr. M. (the plaintiff) had sworn falsely," whereby the defendant meant to insinuate that the plaintiff had wilfully sworn falsely in the said affidavit, and had thereby been guilty of wilful and corrupt perjury. *Held*, That the count was not defective, and that it contained proper averments of the facts necessary to shew that perjury was imputed to the plaintiff, *Held* also, that to constitute perjury at common law it was not necessary to aver that the affidavit had been used, as the crime did not depend on the subsequent use of the affidavit, but was complete on the false swearing. *Milner v. Gilbert*, 1 All. 51.

**52—Trespass—Expulsion.**

Expulsion from part of the close is sufficient to sustain the count for expulsion. *Gesner v. Cairns*, 2 *All.* 595.

**53—Excessive distress—Necessary allegation.**

The declaration in an action for excessive distress, alleged that the plaintiff held land as tenant to defendant at a certain rent; that the defendant wrongfully seized goods on the premises as a distress for arrears of rent alleged to be due, viz: \$311, and sold the same for the said alleged arrears, whereas a small part only of the said alleged rent, viz: \$70, was in arrear. There was no allegation that more goods were taken or sold than were necessary to produce the rent actually due. *Held*, That the declaration disclosed no cause of action; that some rent being due, the distress itself was not a wrong, and that the mere distraining and selling on a claim of more than was due, was not actionable. *Preston v. Simonds*, 1 *Han.* 44.

**54—Married woman—Living apart—Allegation.**

A declaration alleging that the plaintiff was a married woman, living separate and apart from her husband, and compelled to support herself, and that the defendant contracted with her while she was such married woman and compelled to support herself, sufficiently shows the plaintiff's right to sue in her own name under the Act. *Abel v. Light*, 1 *Han.* 97.

**55—Special assumpsit—Consideration for promise—Allegation—Ambiguity.**

The first count of a declaration stated that on the 1st November 1865, in consideration of the assignment of license No. 84, made to defendant by plaintiff, at defendant's request, defendant undertook and promised that F. should deliver to plaintiff whatever quantity, say, not to exceed 165,000 feet of logs by the 10th July then next. Averment, that although the time for the delivery of the logs had elapsed, and the plaintiff was ready and willing to receive them, yet F. did not deliver them, whereby, etc. The fourth count stated that on the

day and year aforesaid, in consideration of the assignment by the plaintiff to the defendant of a certain license, then and there agreed upon between them, defendant undertook and promised that F. should deliver plaintiff, whatever quantity of logs said F. had before then agreed to deliver plaintiff in the year 1866, not to exceed 165,000 feet, by the 10th July then next. Averment, that F. had agreed to deliver plaintiff 135,000 feet in 1866. Breach that F. did not deliver the logs, *Held*, 1st. That a sufficient consideration for defendant's promise, was alleged, but that the promise, as stated in the first count, was uncertain and unintelligible; 2nd. That the words, "on the day and year aforesaid," in the fourth count, did not necessarily refer to the 10th July 1866 (the last day mentioned in the preceding count,), but might refer to the 1st November 1865; and being only an ambiguity, the objection could not be taken on general demurrer. *DeBrisay v. McLeod*, 1 *Han.* 122.

**56—Case—Refusing to register under Medical Act.**

By the Act 22 Vic. cap. 18, sec. 11, every person in the Province possessed of a medical degree or diploma to practice medicine or surgery, from any college in Great Britain, Ireland, Canada, France, or the United States, authorized to grant the same, shall on payment, etc., be entitled to be registered under the Act, and by sec. 12, no qualification shall be entered on the register, unless the Registrar is satisfied by the proper evidence, that the person is entitled to it. *Held*, in an action against the Registrar for refusing to register the plaintiff, 1st. That the defendant was not liable unless he acted maliciously; and that an averment in the declaration that he *wrongfully* and *injuriouly* refused to register the plaintiff, was insufficient. 2nd. That the mere production of a diploma to the Registrar, was not sufficient evidence of the authority of the college to grant it: the declaration should have averred that proper evidence of the plaintiff's title to registry was tendered to the defendant. *Peterson v. Harding*, 4 *All*, 588.

**57—Identity in name—Proof.**

The plaintiff described himself in the declaration "J. Kerriken, otherwise called J. Carrigan," and in support of the action produced an acknowledgment signed by the defendant, of a balance due from him to J. Kerriken. *Held*, That it was necessary for the plaintiff to identify himself with the party mentioned in the acknowledgment, and without proof that the J. Kerriken there mentioned was also called J. Carrigan, the action could not be maintained. *Kerriken v. Copeland*, 3 *Kerr* 567.

**58—Judgment—Name—Averment.**

In an action on a judgment signed against J. H. W. by the name of J. W. W., it is sufficient to aver that the defendant and J. W. W. are the same person. *Young v. Woodcock*, 3 *Kerr* 554.

**59—Defamation.**

In an action of defamation for calling a woman a whore, it is sufficient to aver in the declaration that the defendant intended to impute unchastity. *Martindale and Wife v. Murphy and Wife*, *Ber.* 85.

**60—Assumpsit—Attorney—Negligence.**

Declaration stated that in consideration that the plaintiff at the request of the defendant had retained him as an attorney for certain fees, to prosecute an action at the suit of the plaintiff against C. for money owing to him from C., the defendant promised the plaintiff to prosecute the action in a skilful and diligent manner, and accepted the retainer, and afterwards as the plaintiff's attorney, commenced an action against C. at the suit of the plaintiff for the recovery of the money, and it thereby became the duty of the defendant faithfully and diligently to act as the attorney for the plaintiff; yet the defendant not regarding his duty etc. did not faithfully prosecute the action, but on the contrary prosecuted the same to trial in so unskilful and negligent a manner that the plaintiff was non-suited, and was not only prevented from recovering the money from C., but was obliged to pay £17 for the costs of the

costs of the suit, etc. *Held*, That this was a declaration in *assumpsit* and not in *case*, and that it disclosed a sufficient cause of action. *Carrigan v. Andrews*, 1 *All.* 485.

**61—Award—Action on—Concurrent Acts.**

An award directed that the defendant should pay the plaintiff a sum of money on a certain day, and that on such payment being made the defendant should be entitled to receive, and the plaintiff should deliver him two parcels of sleepers then lying at L. *Held*, That they were not concurrent acts, and in an action on the award for the money, it was not necessary for the plaintiff to aver a readiness to deliver the sleepers. *Hassell v. Wilson*, 1 *All.* 618.

**62—Negligence in repairing street—Allegation.**

The Corporation of St. John being bound by law to lay out, alter and repair the streets in the city; it is sufficient in an action against them for negligence in repairing a street, to allege that it was the duty of the defendants in so repairing etc., to use due and proper care etc.—without stating any facts to shew their liability—their authority to repair etc. being matter of public law, of which the Court was bound to take notice. *Henderson v. The Mayor etc. of St. John*, 1 *Pug.* 197.

**63—Allegation of special demand—Necessity of—Readiness to pay.**

Where the consideration of an agreement is an antecedent debt, a demand is not a condition precedent to the right of recovery; but readiness to pay according to the agreement is matter of defence. The declaration alleged, that on the 30th September, 1824, defendant being indebted to plaintiff in £80, as well for money lent and advanced to defendant, as for money had and received, etc., agreed with the plaintiff to pay him the said sum of money sixteen months after date, in hay and grain, to be delivered at W. at the current price; and that the plaintiff, in consideration thereof, agreed to accept payment of the said sum of money at the time and in manner aforesaid; that plaintiff

had always been ready and willing to accept and receive the hay and grain at W. in payment of the debt, according to the agreement, but that defendant had not paid the money in hay and grain at W. though often requested, etc. *Held*, on demurrer. That the declaration was sufficient, and that it was not necessary to allege a special demand of the hay and grain at W., but if defendant had the hay and grain ready to deliver according to his agreement, he should have pleaded it. *Slott v. Kermott, Mich. T. 1827.*

#### **64—Consideration Sufficiency of—Guarantee.**

The declaration stated, that G. was indebted to plaintiff in £50, and that defendant, in consideration thereof, and that plaintiff would give time to G. for three years, promised to pay plaintiff the £50 in three years. *Held*, That this was not supported by a guarantee by defendant that G. should pay plaintiff the £50 in three years. *Johnston v. Frazer, Mich. T. 1832.*

#### **65—Pleading—False representation—Insufficient averment.**

In an action for deceit, the declaration stated that the plaintiff bargained with the defendant to buy and take an assignment from him for the sum of five shillings, of certain judgments in the defendant's hands, *inter alia* a judgment in favor of the defendant recovered in the Supreme Court of Nova Scotia against J. C. for £129, and that the defendant then and there falsely, fraudulently and deceitfully represented to the plaintiff that the said judgment had been recorded in the Book of Registry of Deeds, whereby J. C.'s lands were bound, and that an execution could issue thereon under which his lands could be sold, and that the judgment had priority over a mortgage on the land given to A. Averment, that the judgment had not been recorded and that J. C.'s lands were not bound thereby, and that no execution could issue on the judgment under which J. C.'s lands could be sold, and that the judgment had not priority over A.'s mortgage as the defendant at the time of making the said false and deceitful representation, well knew, whereby the defendant falsely deceived the plaintiff,



and thereby the judgment against J. C. became of no value to the plaintiff, and he had sustained damage to the amount of £500 in not being able to issue execution and sell the land, and in consequence of the judgment not having priority over A.'s mortgage. It was proved that the defendant was the attorney on the judgment, that it was not recorded, and that by the law of Nova Scotia, land could not be sold under execution unless the judgment was recorded. Verdict for the plaintiff for £126. *Held*, That as the declaration did not shew that the false representation was the inducement to the plaintiff to enter into the contract, but that the contract was only for the assignment of the judgment (which the defendant had given the plaintiff), and as the injury to the plaintiff depended on the consideration paid, and there was no allegation of the value of the judgment, or of J. C.'s land, the verdict could not be sustained. *Knapp et al. v. McFarlan and Dixon*, 4 All. 284.

**66—Pleading—Declaration—Common breach.**

The declaration contained a special count setting out an agreement made by the defendant to pay the plaintiff £18 15s., which was due by A. to the plaintiff on the 1st May then next, in consideration of his giving time to A. until the said 1st May; or that A. should then deliver to the plaintiff a yoke of oxen and a colt in good working condition; and averring that A. did not pay or deliver, etc., of which the defendant had notice; to this were subjoined the common counts: *Held* That the usual breach at the conclusion of the declaration sufficiently alleged the non-payment by the defendant of the sum mentioned in the special counts. *Marks v. Scott*, 2 Kerr 379.

**67—Covenant—Proviso—Necessity of setting out in declaration.**

Where the promise or covenant contains an exception or proviso qualifying the defendant's liability, the declaration must state the exception or proviso, and it will be wrong to state the contract as an absolute one; but if the covenant or clause in an agreement is absolute in itself without any exception or proviso or any reference to any

it may be declared on as an absolute contract, although, in a direct part of the deed or instrument, there is a proviso defecting or qualifying it under certain circumstances. Such a proviso being in the nature of a defeasance and to be set up on the other side. *Hall v. Allen*, 2 *Pug.* 192.

**68—Condition precedent—Averment of performance necessary—Payment of money—Contract for building house.**

By an agreement dated July 24 1875, the defendant agreed to build a house for the plaintiff and furnish it by April 1st 1876, and the plaintiff agreed to pay the defendant \$400 on the 15th August then next, and to make other payments as the work progressed. No payment after the \$400 to exceed the amount of work done. In an action against the defendant for breach of the agreement in not finishing the house by April 1st 1876, it was held that the payment of the \$400 was a condition precedent to the plaintiff's right to recover, and that the declaration was bad because there was no averment in it of the payment of that sum. *Driscoll v. Barker*, 2 *P. & B.* 407.

**69—Specifying property injured—Tort.**

In an action for injury to personal property contained in a building, it was held not necessary to specify the property injured, and that the words "the property therein" were sufficient. *Brewing v. Berryman*, 2 *Pug.* 515.

**Mortgagor in possession—Description.**

A mortgagor in possession of property is properly described as being "seised and possessed" thereof. *Ibid.*

**70—Bail—Declaration disclosing no cause of action.**

The declaration alleged the issue of a *capias* out of a Justice's Court against A. at the suit of M.; that the plaintiff became bail for A.; this judgment was recovered and execution issued and delivered to defendant a constable; that A. had sufficient goods and chattels which were pointed out to the defendant, and out of which he could have levied the execution; but that he refused to levy on the goods and falsely returned on the execution that he could not find any goods or chattels or the body of A., whereby the plaintiff as bail was compelled to pay the debt. *Held*

per Carter, C. J., N. Parker and Wilmot, J. J., (Parker J., diss.) that the declaration disclosed no cause of action ; the undertaking of the bail being that they should be answerable for the debt, or that A. the defendant should be rendered into custody unless he pointed out property to satisfy the execution, and the declaration did not shew that the bail had done all that their undertaking required *Towers v. Stephenson*, 5 All. 98.

**71—Necessity of setting out judgment appealed from—  
Order of privy council.**

A declaration alleged that at a Court held at Winsor Castle before the Queen and her Privy Council, a report was read from the Judicial Committee. The report was then set out, the substance of which was that the Queen had referred to the Judicial Committee the matter of an appeal from the Supreme Court of New Brunswick between plaintiffs, assessors of rates for S., and defendants ; that a petition by plaintiffs was presented, setting forth the issuing of a warrant of assesment to them by the Sessions commanding them to assess the sum of \$958 upon the town of S. ; that they had assessed defendants among others ; that a *certiorari* was obtained by defendants to remove the said assesment into the Supreme Court, and that, on the 23rd February, 1873, the assesment was quashed ; that plaintiffs applied for leave to appeal to her Majesty from the order of the Court ; that such leave was granted, and the proceedings transmitted to Her Majesty with a petition of appeal praying for reversal of the judgment ; that the Judicial Committee, in obedience to Her Majesty's order, had taken the matter into consideration and heard counsel, and had reported to Her Majesty, as their opinion, that the judgment ought to be reversed with costs, and in case Her Majesty should approve of their report and reverse said judgment, that the respondents (defendants) should pay to the appellants (plaintiffs) the sum of £278 19s. 6d. stg., for the cost of the appeal. It further alleged, that thereupon Her Majesty took said report into consideration and was pleased by and with the advice of her Privy Council, to approve

thereof, and to order, and it was thereby ordered, that said judgment be reversed with costs, and that said judgment was in full force and unsatisfied. On demurrer, *Held*, per Weldon, Fisher and Wetmore J. J., That the declaration was sufficient, that plaintiffs were entitled to judgment; but, per Allen, C. J., and Duffs, J., That it was insufficient because it did not allege the existence of a judgment in the Supreme Court which had been appealed from and reversed.

Second count alleged, "That at a Court held before the Queen and Her Privy Council at Westminster, being a Court of Great Britain duly holden and having jurisdiction in that behalf, in a suit therein pending between the now plaintiffs and the now defendants, the now plaintiffs recovered against the now defendants by the judgment of the the said Court, the sum of £279 19s. 6d.

On demurrer, *Held*, per Allen, C. J., and Weldon and Duffs, J. J., (Fisher and Wetmore, J. J., dissenting), That this count was bad, as there was no court of original jurisdiction before the Queen and Her Privy Council, such as was described in it, and if the judgment were intended to be that of an appellate tribunal, it should have been shewn that it was given on appeal from an inferior Court. *Dow et al. v. Black et al.*, 3 *Pug.* 432.

**72—Promissory note—Necessary Averments—Equivocal words—Construction against party pleading.**

In an action against the endorser of a promissory note, the declaration, which after stating presentment, contained the averment that the maker did not pay; but neglected and refused so to do, of which defendant had notice, was *held* bad on general demurrer. Notice of presentment as well as non-payment should be alleged, an averment that the note was duly presented for payment and was dishonoured, whereof the defendant had notice, would be sufficient under the shortened form given in the Common Law Procedure Act.

In pleading, if the words are equivocal, and two meanings present themselves, that construction shall be adopted

which is most unfavourable to the party pleading. *Bank of Nova Scotia v. Estabrooks*, 3 *Pug* 71.

**Omission of material averment—Nonsuit.**

Though the averments in a declaration are proved, if a material averment, essential to the maintenance of the action is omitted, the defendant will be entitled to a nonsuit though he might have demurred. *McPhelim v. Weldon*, 5 *All* 558.

**73—Action of Sheriff's bond.**

In an action brought on bond given by sheriff under Rev. Stat. cap. 131, (Consol. Stat. cap. 25) it is not necessary that it should appear on the face of the judgment obtained against the sheriff that the action was brought for a breach of the duties of his office; and it is sufficient if such breach of duty is set out in the action on the bond and proved. *Miller v. Weldon*, 2 *Pug*. 227.

**74—Repairing public streets—Duty of corporation—Allegation of street being under control of Corporation—Necessity of—Evidence.**

In an action on the case brought by the administratrix of G., against the Corporation of St. John, the declaration alleged that defendants had the care, control and management of the public streets, which it was their duty to keep in a safe and proper condition, and that a certain public street in said City ran over ground covered at times with water, and at low tides the roadway is high above the bed of the water below; and it was defendants' duty to have placed a guard or fence along the side of said street to prevent persons passing along from accidentally stepping over the side and falling on the rocks below; but that defendants, not regarding their duty, negligently, illegally and improperly left said street without any proper fence or guard, and plaintiff, while lawfully walking in the night time along said street, without any fault of his own fell from said street upon the earth and rocks below and was killed. On demurrer it was objected that, as there were in St. John some public streets over which the Corporation had no control, because they were not established and

adopted as provided by the Charter, the declaration was bad in not alleging that this was an adopted street; but, *Held*, That the declaration was sufficient, and that it would be a matter of evidence to show that this street was a public street under the control of the Corporation. *Gordon v. Mayor, &c., St. John.* 3 pug 226.

**Master and Servant—Negligence of Master Averment.**

Not necessary to charge expressly that defendants had knowledge of defective materials or incompetency of his foreman. *See Negligence* 8 *McDonald v. McFee*.

**Special damage—Necessity of alleging injury from leaves falling on house.**

*See Evidence* III. 28 *Mullis v. Rose*.

**Ancestor and heir—Covenant. Appointment of Appraiser—Allegation of request and refusal.**

*See Covenant* 18. *Wood v. Peters*.

**Counts—Distinct Causes of Action.**

*See Practice* I. 4.

**Joinder of Actions.**

*See Action at Law*.

**Material Allegation—Failure in proof—Non-suit although declaration demurrable.**

*See Non-suit*.

**Replevin Goods not claimed.**

If part of the goods mentioned in the writ of Replevin are not found and replevied by the Sheriff, they should not be included in the declaration. *Steeves v. Wilson, Mich, T.* 1869.

(*See Replevin, same case.*)

II.

**PLEAS—SUBSEQUENT PLEADING, ETC.**

**1—Rien in arrear is not a good plea in an action for double value.**

*Strange v. Bell, Ber.* 287.

**2—Debt.**

*Nil debit* is a good plea in a summary action of debt on a record, under the Act 12 Vic. cap. 46. *Wilmore v. Proven*, 4 All. 442.

**3—Assumpsit—Discharge of debtor—Order—Fraud—Replication.**

Defendant pleaded in assumpsit, that he was discharged from the debt by the order of a Judge under the Insolvent Debtors' Act 21 Vic. cap. 17. Replication—that the order was obtained by fraud and concealment, and by giving undue preference to certain creditors. *Held*, That the plaintiff should have opposed the defendant's discharge before the Judge under section 14, and therefore the replication was bad. *Collins v. Boyle*, 4 All. 582.

*Semle*, That fraud in the proceedings before the Judge might vitiate the order. *Ibid*.

**4—Covenant—Policy of insurance—Settlement and adjustment of claim—Alder after verdict.**

In an action on a policy of insurance for \$4000, alleging that the plaintiff had sustained damage to that amount, the defendant pleaded that the loss and damage sustained by the plaintiff, and the amount which he was entitled to receive by virtue of the policy, was settled and adjusted between the plaintiff and defendant at \$3,500, and that the defendant paid and satisfied that sum to the plaintiff in full for his loss and damage, and for any claim against the defendant under the policy. Replication—that the defendant did not pay and satisfy to the plaintiff the said sum of \$3,500, in manner and form, etc. On a verdict for the defendant on this issue—*Held*, That even if the plea was bad on demurrer, for not traversing the allegation, that the plaintiff had sustained damage to the amount of \$4,000; it was sufficient after verdict, and therefore the plaintiff was not entitled to judgment *non obstante veredicto*: and *Semle*, That the plea would be good on demurrer. *McLean v. Phoenix Insurance Company*, 2 Han. 179.

**5—Debt—Policy of guarantee—Non est factum.**

In an action of debt on a policy of guarantee under seal,

which had been renewed agreeably to its terms of payment of the premium and the giving of a renewal receipt, the defendant pleaded *non est factum*. *Held*, That this merely traversed the making of the policy, and not the renewal receipt. In an action on a policy of guarantee, the declaration averred general performance, and the defendant in addition to a plea of *non est factum*, gave a notice of defence which set forth that plaintiff did not well and truly perform and fulfil all things contained in the said policy of guarantee and the conditions thereon indorsed, on their part to be performed. *Held*, That this notice being a traverse of a general averment of performance, was bad. *Commercial Bank v. European Assurance Society*, 2 Han. 219.

#### **6—Debt—Insurance—Fraud—Lunatic—Deed.**

To an action on a policy of insurance against fire, the defendant, pleaded that the plaintiff's deed of the premises insured was obtained by fraud and without consideration from one Coll, who was a lunatic, and so continued until his death, and that the plaintiff had no insurable interest. *Held*, That the plea was bad. The defence that a deed was obtained from a lunatic in fraud, can only be raised by the party defrauded or his representatives.

*Hickman v. The North British and Mercantile Insurance Company*, 2 Han. 235

#### **7—Award.**

To debt on a bond conditioned to perform an award, it is a good plea in bar, that part of one entire sum awarded by the arbitrators, arose out of a matter not included in the submission. *Hill v. Coy*, 1 Kerr 187.

7 a—Any facts which vitiate an award (except misconduct of the arbitrators) may be pleaded in bar to an action on the arbitration bond or on the award, though such facts do not appear on the face of the award. *Rideout v. Stickney*, 1 All 350.

#### **8—Bail.**

Bail cannot plead to an action on the recognizance, a reference of the original suit to arbitration. They should apply to the Court to have an *exoneretur* entered on the bail piece. *Sharp v. Connell*, 3 Kerr 125.



**9—Policy of insurance—Conditions—Breach.**

Where by the conditions subjoined and referred to in a policy of insurance upon goods against fire, it is declared "that if there should at any time be more than twenty-five pounds weight of gunpowder on the premises insured, or where any goods are insured, such insurance should be void, and no benefit derived therefrom," the deposit of gunpowder over the above mentioned weight, though for a temporary purpose, will vacate the policy. To a plea alleging such a breach of the conditions of the policy, a replication averring that the powder had been put on the premises without the plaintiff's privity, because a vessel in which it was intended to ship it to Windsor had sailed without it, and the plaintiff had used every exertion to find another conveyance without success, in consequence of which it remained on the premises until a fire broke out, which eventually consumed the plaintiff's premises, but that before it reached those premises, the gunpowder was removed, and thrown into the harbour, and no loss or damage occasioned thereby to the goods insured, was held bad on demurrer. *Faulkner v. Central Fire Insurance Company*, 1 Kerr 279.

**10—Covenant—Breach—Title—Answer.**

To an action of covenant upon the words "grant, bargain and sell," in a conveyance of land, assigning as a breach the existence of a prior mortgage, the defendant pleaded that the mortgage was recorded in the public records, and that the plaintiff received the deed subject to such mortgage: an issue thereon having been found for the defendant, judgment was given for the plaintiff, *non obstante veredicto*, the plea being no answer to the action. The covenant is broken immediately, and the plaintiff need not wait until he is evicted before bringing his action. *Good v. End*, 1 All. 603.

**11—Covenant—Mutual and independent.**

The defendant covenanted with the plaintiff to teach him the trade of a blacksmith, and the plaintiff covenanted to serve the defendant faithfully for five years, and not to

absent himself from the defendants service without leave. *Held*, that these covenants were mutual and independent, and that the non-performance by the plaintiff was no defence to an action against the defendant for breach of his covenant. *Hunter v. Gifford*, 1 All. 701.

#### 12—Assumpsit—De injuria.

*De injuria* may be a good replication in an action of assumpsit, and is not confined to actions of tort. *Bank of British North America v. Fisher*, 1 All. 606.

In an action by the indorsee against the maker of a promissory note, the defendant pleaded that the note was discounted by the plaintiff on a usurious contract. Replication *de injuria*, held good. *Ibid.*

#### 13—Duplicity.

A plea which averred that a bill of exchange was accepted and received by the plaintiff in full satisfaction and discharge of the sum due, and that afterwards the drawee on sight accepted the said bill of exchange, and became liable to pay the same according to his acceptance, was held bad upon special demurrer for duplicity, as alleging two separate and distinct grounds of defence admitting of different replies. *Boyd v. McLaughlan*, 1 Kerr 210.

#### 14—Recognizance—Sureties.

The sureties in a recognizance entered into under the Rev. Stat. cap. 98, "Of Controverted Elections," cannot plead, that they entered into it by a fraudulent representation of the nature of it, believing it to be the obligation of the principal only. *The Queen v. Sparrow and others*, 1 Han. 113.

If the recognizance was obtained by fraud, the sureties should apply to the Court to vacate it: but while it stands as a record, they are estopped from denying the truth of it. *Ibid.*

#### 15—False imprisonment—Justification.

In an action for false imprisonment, the defendant justified under a judgment and execution against the plaintiff; replication, that the execution was irregularly issued, and

was in consequence ordered by a rule of the Court to be set aside for irregularity. *Held*—1st. That the replication was not double; 2nd. That the rule of Court was not a record, and could not be pleaded with a *prout patet*, etc.; 3rd. That the nature of the irregularity need not be stated; and that after the execution was set aside it would be no justification for anything previously done under it. *Watson v. Roberts*, 1 *All.* 108.

**16**——To an action of false imprisonment the defendant pleaded in justification a judgment and execution—replication *nul tiel record*. *Quere*, Whether the Court could judicially notice an endorsement on the judgment roll of a rule setting aside the judgment. *Semble*, That the replication was good; but that the more proper course was for the plaintiff to apply to the Court to set aside the plea; or that he might reply the order of the Court for setting aside the judgment, on which issue *in pais* might be taken. *Wilson v. Andrews*, 1 *All.* 715.

After a judgment is set aside it cannot afford a justification to the attorney for anything done under it. *Ibid.*

**17—Trespass—License covering part.**

In trespass for cutting trees, to which the defendant pleads a license to commit the injuries complained of, and the plaintiff replies *de injuria*, evidence of a license which covers some but not all the trespasses proved, will not sustain the justification. It is not necessary to new assign the excess, as the replication traverses the justification to the extent pleaded. *Baxter v. Foshay*, 1 *All.* 413.

**18—Trespass—Plea not traversing or confessing.**

To a declaration in trespass alleging a seisin in fee in the plaintiff, the defendant pleaded that the Queen being seized in fee of all mines etc. granted a license to the defendant, to make use of, work and dispose of all such mines within the *locus in quo* for twenty-five years, by virtue of which he entered for the purpose of working a coal mine; color was then given to the plaintiff by a supposed charter of demise to him for life from the Queen, before the license

to the defendant, and the plea stated an entry on the plaintiff's possession for the purpose of working the coal mine under the license. *Held*, That the plea was bad, as it neither traversed nor confessed the plaintiff's seisin; that if the plaintiff's seisin in the land was admitted, the plea should have shown how the seisin in the mines was separated from the seisin in the land; and that it should also have shown how the Queen, or the defendant, acquired a right of entry on the land. *Held* also, That it was not a case for color, *McMahon v. Berton*, 1 *All.* 706.

**19—Entry on land to retake timber.**

A plea justifying an entry upon plaintiff's land to retake timber carried there by a sudden rise of water, should shew that the defendants were not in fault, by having used their best endeavors to prevent the timber coming upon plaintiff's land. *Quere*, Whether an entry and injury to soil and herbage could be justified even under such circumstances. *Read v. Smith et al.*, *Ber.* 178.

**20—False imprisonment—Name.**

In an action for false imprisonment in arresting the plaintiff (R. C.) under a *capias* issued by a Justice of the Peace against W. C., the plea stated that the defendant *duly made oath* before the Justice that the plaintiff, by the name of W. C., was indebted to the defendant in the sum of £5, that the plaintiff was known by the name of W. C., and was the real person against whom the *capias* issued by the name of W. C. *Held* bad.—1st. Because it did not appear that there was any affidavit in writing to warrant the *capias*; 2nd. That it was not sufficiently shewn that the plaintiff was commonly known by the name of W. C. as well as R. C. *Clark v. Lawrence*, 3 *Kerr* 152.

**21—Limitations—Place—Averment.**

*Assumpsit*. Plea, *actio non accrevit infra sex annos*; replication, that the plaintiff at the time when, etc., was and has ever since continued at Z., in the State of Ohio, one of the United States of America, and out of this Province. *Held*, on special demurrer, That the replication need not allege the place to be beyond the seas, nor

that the plaintiff returned to the Province before bringing his action, to bring him within the exception of the Provincial Statute of Limitations. *Hampson v. Abbot*, 1 Kerr 490.

**22—Negligence—Attorney—Bail Bond.**

In an action against an attorney for negligently conducting an action brought by the plaintiff as assignee of a bail bond, in consequence of which the action was discontinued and the defendants therein discharged out of custody; the defendant pleaded that the principal in the original action did appear according to the condition of the bond. *Held*, That this was no defence to the action. *Crawley v. Wilson*, 1 All. 704.

**23—Nul Tiel Record.**

To a plea of appearance in an action in the Court of Common Pleas in September term 12 Vic., the plaintiff replied *nul tiel record*, and on the trial of the recognizance of bail appeared to be of that term, but not to have been filed until a year afterwards, and after the term in which the plea was pleaded. *Held*, that the plea was not proved. *Crawley v. Wilson*, 1 All. 718.

**24—General issue—Notice of tender.**

It is irregular to plead the general issue to the whole declaration, and give notice, under the Act 13 Vic. cap. 32, of a tender as to part of the demand; and where, on such pleadings, a verdict was found for the defendant, it was set aside and entered for the plaintiff for nominal damages. *Conlan v. Campbell*, 3 All. 348.

**25—Assignee of lessee against lessor—Covenants.**

In covenant, by the assignee of lessee against lessor on a lease of land from 1st February 1880, for eleven years, with covenants that at the expiration of the lease the lessee and defendant should each appoint an appraiser to appraise the value of the improvements, etc, and that the defendant should then declare his option to pay for the improvements or continue the lease for a further time, with a clause of forfeiture if the rent should be in arrear. Breach, that at

the expiration of the term the plaintiff (assignee) appointed an appraiser, notified the defendant, and requested him to choose one ; but he did not, nor pay for the improvements, nor grant a further lease. Second plea, that the defendant was always ready and willing to continue the lease, etc., but the plaintiff never tendered one for his execution. Fourth plea, that before the expiration of the lease a quarter's rent was in arrear, and the defendant demanded it on a day in the following quarter and took possession as of his former estate. Fifth plea, that the defendant was always ready and willing to continue the lease for a further time, under the like covenants contained in the original one; that the plaintiff continued in possession as tenant from year to year for a long time after the expiration of the lease, when the defendant assigned the reversion to B. and C.; that the plaintiff did not, before such assignment to B. and C., nominate an appraiser, and give notice thereof, etc., nor request the defendant to choose one, nor did he after the assignment request B. and C. to choose an appraiser, etc. On general demurrer to these pleas—*Held*, That the second plea was bad, the averment of readiness and willingness therein not being sufficient for the performance of the defendant's covenant, and that he was bound to have made his option, and declared it to the plaintiff. *Held* also, That the fourth plea was defective, as it showed no sufficient demand to work a forfeiture. *Held* also, That the fifth plea was bad for the same reason as the second. *Ansley v. Peters*, 8 Kerr 543.

#### **25 a—Defence against rent.**

*See Former Recovery. See Action at Law VIII.*

#### **26—Nuisance—Statute of Limitations.**

In an action on the case for a nuisance in overflowing the plaintiff's land by a dam, which was erected by the defendant more than six years before bringing the action. *Held*, That the effect of a plea of the Statute of Limitations was not to bar the action, but only to limit the recovery of damages to the last six years. *Connors v. McLaggan*, 2 Kerr 446.

**27—Replevin—Non Cepit—Evidence under.**

Whatever might formerly have been pleaded to an avowry, may, since the Revised Statutes, cap. 126, be given in evidence at the trial in answer to the defence under the plea of *non cepit*. *Myers v. Smith*, 4 *All.* 207.

The defendant in replevin is entitled to damages on a verdict in his favour on the plea of *non cepit*, if he gives such evidence as would have supported an avowry under the former law. *Ibid.*

**28—Replevin—Plea—Replication.**

In replevin, the defendant pleaded, (2nd) that before the alleged taking, he was master of a ship, and that the goods had been shipped aboard at London by D., on which occasion defendant, as master, signed bills of lading to deliver the goods at St. John to the order of D., and that no bill of lading indorsed to the plaintiff by D. was produced by plaintiff to defendant, wherefore he refused to deliver the goods to plaintiff. Replication, That D. had sent the bill of lading to the plaintiff to enable him to receive the goods, and the same was then in plaintiff's possession, with full power from D. to receive the goods from defendant, but D. had not indorsed the bill of lading to the plaintiff; that he requested defendant to deliver the goods; that defendant represented that R. was the owner of the ship, and that he (defendant) would do whatever R. agreed to; that the plaintiff applied to R. for the goods, who informed plaintiff that C. was the agent of D., that his indorsement of the bill of lading would be satisfactory; that the plaintiff then procured C.'s indorsement of the bill of lading as the agent of D., and produced the bill of lading so indorsed to the defendant, who refused to deliver the goods. Rejoinder, That the plaintiff never produced to defendant any proper authority from D. to receive the goods: and that before the bill of lading indorsed by C. was produced to defendant, R. had forbidden the defendant to deliver the goods to plaintiff, under the bill of lading so indorsed. *Held*, on demurrer, per Allen and Fisher, J. J., (*Weldon, J., dissente*), That the plea admitting the property in the goods to be in the

plaintiff as alleged in the declaration, was no answer to the action, because the plaintiff was not bound by the bill of lading, and was not deprived of his right to the possession of the goods as owner, by the undertaking of the defendant to deliver them to the order of D. ; and though the defendant having received the goods from D. could not voluntarily set up a *jus tertii*, that was no answer to a claim by a third person, who was the real owner. *Held*, per Weldon J., That the plea was good ; and that the plaintiff should have shewn by replication his right to the goods, and that D. had no title to them, and was wrongfully in possession at the time he shipped them. *Held* also, That the replication was bad, as the agreement to abide by what R. did, was without consideration, and not binding : and it did not allege that C. was the agent of D. That the rejoinder was bad, in stating that the plaintiff produced no proper "authority" from D. to receive the goods, which was a question of law ; also, because it both traversed, and confessed and avoided the allegations in the replication. Fourth plea, Alleging the shipment of the goods at London by D. to be carried to St. John, according to the terms of bill of lading (as in the 2nd plea) ; that freight was due on the goods, and that defendant retained them for non-payment of the freight. Replication, That the plaintiff tendered to the defendant all money due for freight, according to the bill of lading, and that he refused to receive it, and to deliver the goods to the plaintiff. Rejoinder, That the plaintiff had no authority to receive the goods, or to make a tender of the freight ; wherefore the defendant refused to accept the tender or to deliver the goods to the plaintiff. *Held*, That the rejoinder was bad, as being a departure from the plea. *Domville v. Kevan*, 2 *Han.* 38.

#### 29—Replevin—Onus probandi.

When a defendant in replevin pleads property in himself or a third person, and issue is taken thereon, the *onus* of proving property is on the defendant, and if he fails in doing so, the plaintiff is entitled to recover. *Graham v. Wetmore*, 4 *All.* 373.



**30—Replevin—Proof of Plea.**

Defendant in replevin pleaded property in M. and a seizure as Sheriff under execution against M. Replication—property in the plaintiff. On the trial the defendant failed to prove property in M. and a verdict was given for the plaintiff. *Held*, That the defendant was bound to prove the whole plea, and was not entitled to judgment *non obstante veredicto*, on the ground that the replication had admitted that the property was in custody of the law, and therefore not repleviable. *Graham v. Wetmore*, 4 All. 377.

**31—Puis darrein continuance.**

A verdict for the plaintiff was set aside in Easter term, and in May following the defendant obtained a certificate of bankruptcy, but allowed Trinity term to elapse, and omitted to plead his bankruptcy until September, after notice of trial given; the plaintiff took no notice of the plea, and the cause was tried as undefended: the Court in the following term refused to set aside the verdict, and allow the defendant to plead the bankruptcy *puis darrien continuance* as of Trinity term. *Grumble v. Perley*, 1 All. 512.

**32**———Pleas *puis darrien continuance* must be pleaded either in term or at the assizes, and are limited to pleading such matters of defence as have arisen since last continuance. *Vittrini v. Stevens*, 2 Han. 217.

**32 a**———If the defendant omits to plead in due time, a matter of defence arising *puis darrien continuance*, he cannot do so afterwards without leave of the Court: such a plea may be allowed to be pleaded *nunc pro tunc*. *Ibid*.

**32 b**———A plea *puis darrein continuance* regularly pleaded and verified by affidavit, cannot be set aside as false. If the facts stated in the plea are denied, the plaintiff should take issue on it. *Gilbert v. Graham*, Mich. T. 1872.

**32 c—Release executed during trial.**

In an action brought by one joint owner of property, the defendant put in evidence a release of the action by the other joint owner executed during the trial. *Held*, That

to be of any avail it should have been pleaded *puis darrein continuance*. *Godard v. Fred'n Boom Co.*, 6 All 448.

**When Court will not set aside.**

See Practice VI. 40.

**33—Trespass—Distress for rent.**

It is a good plea to a declaration in trespass for taking goods, that the goods were distrained for rent and not being replevied within five days were appraised, and after such appraisement kept and detained in satisfaction of the rent; although the defendant should have proceeded to sell the goods, yet the omission to do so will not enable the owner to maintain trespass, the original taking being lawful. The option granted by the Act 50 Geo. III, cap. 21, sec. 7, to bring trespass or case, is to be understood according to the subject matter of the grievance, and not the mere election of the party. *Rogers v. Buntin*, 2 Kerr 230. (See Action at Law III.)

**34—Trespass—Breaking plaintiff's close.**

To trespass for breaking the plaintiff's close, cutting down the trees there growing, and carrying away and converting the same: the defendant pleaded in the same plea that the close in which, etc., was his soil and freehold, and that he took and carried away the trees because they were incumbering the close. On special demurrer to the plea—*Held*, That the plea was not bad either on the ground of not sufficiently answering the declaration or as amounting to the general issue, and that any objection on the ground of duplicity must be specially assigned. *McLachlan v. Wilson*, 2 Kerr 368.

**35—Non Damificatus—When good.**

See Bond I.—Supra I. 13.

**36—Action against executor—Insolvency.**

Where in assumpsit by A. against B., as executor of C., B. pleaded that the estate of C. was insolvent, and only sufficient to pay 1s. 6d. in the pound, and that A.'s rateable proportion thereof was so much, which was acknowledged on the plea to be still due him; on demurrer—*Held*, That the

plea containing no allegation that the defendant had taken proceedings under the Act to have the insolvency ascertained and the assets duly distributed was bad. It is only under the Act of Assembly 25 Geo. III, cap. 11, that such defence can be made available in a Court of law. *Smith v. Egan*, 1 Kerr 48.

**37—Bill of Exchange given for debt.**

Declaration in assumpsit on the common counts ; plea, admitting the sum of £526 12s. 4d. to have been due to the plaintiff, avers that for that sum the defendant, at Saint Andrews in this Province, drew his bill of exchange on one C. M., payable to the plaintiff, which was delivered to plaintiff, and by him received and accepted for and on account of the sum so due ; replication, that after the bill of exchange was so received, and before it became due and payable, the plaintiff sent the same by a vessel, of which the said C. M. was master, addressed to the plaintiff's agent in the West Indies, for the purpose of being presented on the said vessel's arrival, but that the vessel foundered at sea on her passage out, whereby the said C. M., the drawee, perished, and the bill of exchange was destroyed and lost, and the plaintiff was unable to present the same, and the same remains wholly unpaid. Special demurrer, assigning for causes that the plaintiff's remedy for the original debt was lost by his taking the bill of exchange, and was not restored by the destruction and consequent non-payment thereof, as set out in the replication ; that the facts stated in the replication were immaterial ; that after the receipt of the bill the liability for the original debt was only a secondary liability, and the plaintiff's primary remedy was against the personal representative of the drawee ; and that the remedy, if any, against the defendant was in equity only. *Held*, That the replication was not defective for any of the causes assigned, but afforded a sufficient answer to the plea. *Boyd v. McLauchlan* 1 Kerr 210.

**38—Sheriff—Escape—Justification.**

To an action on the case against a Sheriff for an escape, the defendant justified under an order of two Justices, made

pursuant to the Insolvent Confined Debtors' Act, directing him to discharge the prisoner in consequence of failure on the part of the plaintiff to pay the weekly support allowed under the Act to the defendant. *Held*, That the plea was bad as not averring that an order was duly made for payment of a weekly support, and that the plaintiff had failed in payment thereof; the mere recital of these steps in the order of discharge not being sufficient. *Power v. Johnson*, 1 Kerr 492.

**39—Trespass—Cattle.**

In trespass by cattle, if the defendant justify the entry of the cattle through defect of fences, it must be specially pleaded. *Griswald v. Hallet*, Mich. T. 1834.

**40—Breaking and entering close—Taking property—Justification—General issue.**

In trespass, the first count charged a breaking and entering plaintiff's close, and taking and carrying away 50,000 deals and a horse, and converting and disposing of the same to defendant's use. The defendant pleaded,—as to breaking and entering the close, and seizing the goods in the first count mentioned, and carrying away and disposing of the said horse—*actio non*, because one P. had recovered a judgment in a Justice's Court of the County of K., against the plaintiff for £4 18s. 8d., on which execution was issued, and delivered to D. a constable of said county, to be executed; that D. as such constable, and defendant as his servant, and by his command, seized and took the goods and chattels in the first count mentioned for the cause aforesaid, and entered the plaintiff's close for that purpose; and that after publicly advertising the goods and chattels for five days, the constable sold the horse to satisfy the execution: and, as to all the supposed trespassers in the declaration mentioned, except those stated in the introductory part of the plea,—not guilty. *Held*, That this plea answered the whole declaration: that defendant, acting as the servant of the constable, was not bound to justify any but his own acts, or to account for what might have been done by the constable in the disposal of any of the goods except the horse; to which other goods, the general issue applied. *Atkinson v. Desmond* Trin. T. 1863.

**41—Former recovery—Verdict—Judgment not signed.**

A verdict recovered without judgment signed cannot be pleaded in bar to an action between the same parties. *Gilbert v. Graham*, *East. T.* 1873.

**42—Abatement—General issue—Also plea in abatement—Latter plea not available.**

In an action upon an alleged warranty of ownership upon the exchange of waggons, the defendant pleaded the general issue, and also in abatement the pendency of another suit for the same cause of action. *Held*, That he could not avail himself of the latter plea. *Mercer v. Cosman*, 2 *Han.* 240.

**43—Non-joinder of partner can only be taken advantage of by plea in abatement.**

*See* Bills and Notes VI. 10.

**44—False plea—Set aside as frivolous.**

A plea to an action on a promissory note for £266, alleging "that the defendant had paid the said sum of £266 to the plaintiff, which he had accepted in full discharge, and also that the defendant had given to the plaintiff a new promissory note for the said sum, payable in three months, in full satisfaction and discharge," was set aside by the Court as frivolous, upon motion of the plaintiff, supported by an affidavit that the plea was wholly false, and was pleaded for the purpose of delay. *Gabel v. Harding*, 2 *Kerr* 71.

**45—Plea in confession and avoidance—Formal statement of admission not necessary if inferable—Practise when not so.**

It is not necessary that a plea in confession and avoidance be framed with a general confession and admission. It is sufficient if the confession be distinctly implied in, or inferable from the matter of the pleading.

When a plea of this class is defective by reason of the confession or admission not being distinctly implied in or inferable from the matter of the pleadings, the party objecting should apply to the Court or a Judge under chapter 37. Sec. 93 of Consol. Stat. to amend or strike out the plea. *Driscoll v. Barker*, 2 *P. & B.* 407.

**Confession and avoidance—Traversing only the inducement in Count—Insufficiency of plea.**

A plea must either traverse or confess and avoid some material allegation in the declaration—therefore a plea to a count which set out the leasing of a farm and the breaking and entering and carrying away the goods which only traversed the leasing of the farm, and left unanswered the breaking and entering and carrying away of the goods was held bad.

A plea in this case which denied as to the alleged agreement, that defendant broke and entered the premises and wrongfully and illegally took away the goods, and as to the second breach to said alleged agreement, alleged that he did not enter said land against the will of the plaintiff and take and carry away the ten tons of hay as alleged. was held to be demurrable. *Clark v. Harding*, 1 P. & B. 495.

**46—Sufficiency of plea.**

A plea that professes to answer the whole declaration, and only answers a part of it, is bad.

Where the action was for breaking and entering the plaintiff's house and taking his goods, and the plea only justified the taking, the plea was held to be bad. *Grattan v. Givan*, 1 P. & B. 711,

**47—Bona fide defence—Plea—Setting aside of.**

Where the defence to an action is *bona fide* and for the purpose of trying out the rights of the parties, the Court will not set aside the pleas as frivolous, false and vexatious under the 88th section of chapter 37, Consol. Stat. *Milner v. McKenzie*, 2 P & B. 388.

**48—Numbering of pleas—Substantial compliance with Act Consol. Stat. Cap. 37.**

When the pleas were not numbered as required by Consol. Stat., cap. 37, sec. 61, but commenced, "and for a second plea," etc., "and for a third plea," etc., the Court held that this was a substantial compliance with the Statute, and the objection being purely technical, refused to set aside the pleas. *Ibid.*

**49—Breaking. entering and expulsion—Plea answering the breaking and entering only, good.**

The declaration charged the defendant with breaking and entering the plaintiff's land and expelling the plaintiff. The plea answered the breaking and entering, but did not answer the expulsion. *Held*, that the plea was good. as the breaking and entering were the gist of the action, and the expulsion only a matter of aggravation. *Ibid*.

**50—Plea bad when one of several alleged trespasses only answered.**

A plea professing to answer one trespass, where several are alleged, is bad. *Ibid*.

**51—Objection to pleas on several grounds—Plaintiff succeeding on one only—Amendment allowed without payment of costs.**

Where the plaintiff having applied to the Court to set aside the defendant's plea on several grounds, succeeded on but one of the grounds urged, the majority of the Court, Allen, C. J., Weldon, Fisher and Duff, J. J., (Wetmore, J., *diss.*) Allowed the defendants to amend the pleas without payment of costs. *Ibid*.

**52—Duplicity—Customs Act—False invoice—Averment as to.**

A plea raising a defence under the Customs Act 40 Vic. C. 10 sec. 42, was held bad for duplicity where it was alleged in the plea that "the plaintiffs *made or sent* to the defendant into Canada an invoice or paper to be used as an invoice :"—*Gilman v. Phelan*, 2 P. & B. 340.

**53—Plea of Payment—Not shewing that money was paid on claim sued for.**

In an action in which the plaintiff by his particulars claimed the sum of \$687, the defendant's second plea was as follows "and for a second plea to the first and second count of the plaintiff's declaration the defendant &c. says that before this action was brought the defendant paid the plaintiff the amount of \$687, being the full amount stated in the plaintiff particulars. *Held* on demurrer that the plea was bad it not appearing that the amount alleged to have been paid is the same amount and claim as sued for. *Craig v. Glasier*, 1 P. & B. 513.

**54—Joinder of Counts—Defendant refusing to deliver note—Collecting money and applying it to his own use—Replication—Revocation of defendant's authority—Rejoinder—Departure in pleading.**

Joining counts in detinue and assumpsit is a misjoinder, and is a ground of general demurrer.

*Quære*, Whether such a defect is cured by pleading over.

A count stated that plaintiff delivered to defendants a promissory note for the special purpose that defendants should procure payment at maturity on behalf of plaintiff, and if they should not so procure payment, they should re-deliver the same to plaintiff on request; that defendants received the note on these terms; that they did not procure payment at maturity; and that after maturity and before payment, plaintiff requested defendants to redeliver the note to him; yet defendants had refused to do so; and after such request wrongfully collected the money and applied the same to their own use.

*Held*, to be a count in assumpsit and not in tort.

Defendants pleaded to above count that the note was delivered to them as bankers in the usual course of their business to collect and on payment to deliver the note to the maker; that the maker of the note paid the amount of it to defendants when it became due, and that they gave the note up to him as he required. Plaintiffs replication alleged that while the note was in defendant's hands, and before payment, he revoked defendants' authority to collect, and requested defendants to redeliver the note to him which they refused to do. *Rejoinder*, That before the plaintiff revoked the authority to collect, he became indebted to defendants in a larger sum than the amount of the note, which he refused to pay, whereupon they refused to deliver the note to him.

*Held*, a departure from the plea.

*Allen v. Bank of New Brunswick*, 1 P. & B. 446.

*Quære*—Whether there is a banker's lien in this province; if such a lien exists the person against whom it is sought to enforce it must, it would seem be a Customer of the Bank. *Ib.*



**55—Abatement—Nonjoinder of party—Partnership—Plaintiff having reasonable belief as to persons composing firm.**

The plaintiffs contracted with C. C. & Co. to do certain work. An action having been brought against C. C. and A. S. and W. S. to recover for work done on the contract and damages for breach of it by the defendants, the latter pleaded in abatement the nonjoinder of W. who they alleged composed the "Co." with A. S. and W. S. *Held* that the plaintiffs having had reasonable grounds for believing that the three defendants alone composed the firm of "C. C. & Co." it was sufficient to join them as defendants.

*McDonald v. Cumming et. al.* 2 Pug. 282.

**56—Insolvent Act—Discharge under must be pleaded—No answer to proceedings under judgment previously obtained where discharge not pleaded.**

The defendant having recovered a judgment against the plaintiff, issued an execution and levied on the latter's goods. This judgment was set aside and the plaintiff brought an action for trespass for breaking and entering his house and securing his goods. The defendant justified under the judgment. The plaintiff replied that before the first action was brought he had been discharged under the Insolvent Act. *Held*, that the discharge under the Insolvent Act should have been pleaded in the first action, and could not be set up in reply to the defendants' plea justifying under the judgment. *Grattan v. Givan*, 1 P. & B. 711.

**57—Insurance policy—Acceptance of abandonment—Fraud—Necessary averment of defendant's want of knowledge of fraud.**

A person induced by fraud to enter into a contract cannot after he has acted under it so that the parties can no longer be placed in *statu quo*, avoid the contract. Therefore where a party sued upon a policy of Marine Insurance, and the declaration alleged damage to the goods insured, and abandonment to the insurers, and acceptance of the abandonment and sale, a plea stating that the plaintiff at the time of effecting the insurance falsely represented the value of the property, without averring that the defendants

were not aware of the fraud when they accepted the abandonment, and tendered back the proceeds as soon as they became aware of it, was held bad. *Lloyd v. Union Ins. Co.* 2 *Pug.* 498.

**58—Replevin—Non cepit—Other pleas—Onus of proof.**

Lumber was replevied out of the possession of the defendant who appeared to the action and pleaded 1st *Non cepit*—2nd property in the defendant—3rd property in W. E., and 4th property in the Crown. *Held*, 1st. that the plea of *non cepit* only put in issue the taking, and it was sufficient for the plaintiff to entitle him to recover to prove that the defendant had the goods in the place in which, &c. and that the onus of proving property out of the plaintiff was on the defendant; and that this was equally the case where there was a plea of property in the crown. *Ogden v. Burgeois*, 2 *Pug.* 365.

**59**———In Replevin where the defendant pleads *Non cepit* or *cepit in alio loco* the plaintiff must have a verdict if he prove that the defendant had the goods in the place mentioned in the declaration, although the first taking was in another place. *McGowan v. Betts*, 2 *Pug.* 90.

**60—Replevin—Goods in possession of third party—Plea that defendant took them on execution.**

Where in a declaration in replevin, plaintiff alleged that defendant took and unjustly detained plaintiff's property, it is no answer for defendant to plead that the goods were in possession of C. and that defendant took them under an execution against him; or under an attachment issued under the Insolvent Act, such a plea neither traversing nor confessing and avoiding the plaintiff's allegation. *Harrington v. Girouard*, 3 *Pug.* 151.

**61—Replevin—Traverse.**

In replevin a plea alleging that at the time of issuing and service of the writ, the goods were not in the possession of defendant, without traversing the wrongful taking, is bad. *Davidson v. King*, 2 *Pug.* 526.

**62—Plea non-tenuit—Evidence of fraud may be given under.**

*McLeod v. McGuirk*, 2 *Pug.* 238.

**Justices Court—Trespass—Where judgment and execution no justification to the judgment plaintiff.**

See Judgment by default 9. *Jackson v. O'Donnell.*

**Special damage—Traversing allegations of damage not constituting gist of action. Plea must be an answer to the action and not to special damage only.**

See Bond (Replevin bond) *Wheeler v. Stewart.*

**Slander — Privileged communications necessary to shew authority in defendant to make enquiry and to make communications, action by civil service employee against his superior officer.**

See Defamation. *Waterbury v. Dewe.*

**Insurance:—Policy—Conditions precedent—Averment of performance—Waiver fraud. Preventing extinguishment of fire—Application for more explicit statement of facts.**

See Insurance 48. *Gibson v. North, B. & M. Ins. Co.*

**Sheriff making levy on goods of plaintiff prior to assignment by plaintiff under Insolvent Act, cannot justify under assignment.**

See Trover 31. *Harris v. Vail.*

**Award—Party not compellable to plead award Motion to stay action.**

See Arbitration 17.

**Filing plea.**

A plea should be filed as well served and the Common Law Pro. Act (consul. stat. cap. 37,) does not alter the practice in that respect. See Practice VII. 17. *Deter v. Wiley.*

**Plene administravit.**

On an issue of *plene administravit*, real estate of an intestate unsold is not assets in the hands of his administrator for payment of debts. See Executors, &c., V. 6.

**Son assault Demesne—Evidence under.**

See Evidence III. 38.

**Feigned issue.**

See Practice XII.

**De Injuria.***See De Injuria.***Former recovery.***See Action at Law—Former Recovery.***Husband and Wife.***See.*

## III.

## NOTICE OF DEFENCE.

1 ——— A special plea cannot operate as a notice under the Act 13 Vic. cap. 32. *Robinson v. Palmer*, 2 *All.* 223.

2 ——— Proof of the matter alleged in a notice of defence under the Act 13 Vic. cap. 32, will not entitle the defendant to a verdict, unless it amounts to a legal defence. *Whelpley v. Riley*, 2 *All.* 275.

3 ——— A notice given under the Act 13 Vic. cap. 32 may be set aside with costs, if the matter stated is no defence to the action. *Dowling v. Trites* 2 *All.* 520.

4 ——— A notice of defence under the Act 13 Vic. 32, which would have been bad as a special plea, will be set aside with costs. *Wilson v. Street*, 2 *All.* 629.

5 ——— Notices under the Act 13 Vic. cap. 32 should state the grounds of defence with reasonable certainty, and shew in substance, that the matter alleged would have been pleadable in bar. *LeGal v. Duffy*, 3 *All.* 57.

6 — **Notice cannot be given of matter not,pleadable—  
Dilatory Plea—Summary Action.**

In a summary action the defendant pleaded the general issue, and gave notice of defence under the Act 13 Vic. cap. 32, of the pendency of another action for the same promises. *Heid*, *Bad*, because a dilatory plea cannot be pleaded, in a summary action, and a defendant cannot give notice of a defence which he cannot plead. *Thompson v. Keith*, 6 *All.* 133.

7 — **Pleading and Notice.**

If two pleas are pleaded and a notice of other matters of defence given under the Act 13 Vic. cap. 32, the plaintiff

is not justified in treating them as a nullity, but should apply to a Judge to set them aside. *Oulton v. Palmer*, 2 *All.* 364.

**8—Libel—Generality of Notice.**

A notice of defence in an action of libel stating that the allegations contained in the writing complained of are true; is sufficient under the Act 13 Vic. cap. 32, there being no affidavit of the plaintiff that he was misled by the generality of the notice. *Long v. Gilbert*, 4 *All.* 359.

**9—Evidence under General Issue—Not confessing and avoiding.**

A notice of defence under the Act 13 Vic. cap. 32, will not be set aside, because the matter stated might be given in evidence under the general issue; nor because it does not in terms confess and avoid the cause of action alleged in the declaration. *Ladds v. Vernon*, 1 *Pug.* 350.

IV.

MISCELLANEOUS.

Declaration—Copy delivered, presumed true transcript. See Practice I. 5.

Plea in abatement and in bar not allowed. See *Supra* II. 42.

General issue to whole, and tender to part—is bad. See *Supra* II. 24.

**1—Tried by record—What put in issue.**

On a trial by the record, the only thing put in issue by the pleading is the record of the recovery of the judgment described in the declaration; therefore in *scire facias* assigning breaches on a bond payable by instalments, a variance between the writ of *scire facias* and the declaration in reference to the breaches assigned, and an alleged objection to the form on which execution was prayed for by the writ, were held not to be included in the issue. *Kerr v. Kinnear*, 3 *Kerr* 412.

**2—Variance.**

On *Nul Tiel Record* pleaded to a judgment of an Inferior Court a variance between the *ca. sa.* and the judgment, or inconsistency between the teste and issue thereof cannot be taken advantage of. *Spence v. Stewart*, *Ber.* 113, 219.

Demand of plea before expiry of twenty days, irregular.  
*See Practice VII.*

**Plea.**

Admission on one plea does not qualify the issue joined on another distinct plea. *See Evidence X. 2.*

**3—Filing Plea—Interlocutory judgment.**

It is not necessary that a plea should be filed within twenty four hours after a demand of plea; therefore where a copy of plea was delivered within that time, and the plea sent to Fredericton on the same day, and filed in the clerk's office on the following day, an interlocutory judgment signed on the afternoon of the day on which the plea was delivered, was set aside for irregularity. *McCullough v. Collins*, 1 *All.* 499.

**4—Rule to plead several matters.**

Though it is not usual to require a rule to plead several matters to be taken out, if insisted on, it must be done. *Wilson v. Atkinson*, 3 *Kerr* 474.

**5—Service—Time for pleading.**

The day of service of rule to be computed one of the the twenty days allowed for pleading. *Clowes v. Scoullar*, 2 *Kerr* 627.

*De minimis non curat lex*—Application of Maxim. *See Supra I. 23.*

Want of necessary averments—Recovery under common counts. *See Bills and Notes VI.*

Counts of declaration are considered as distinct causes of action. *Crawley v. Wilson*, 1 *All.* 764.

**6—Declaration—Entitling—Cause of action—Time,**

It is not a ground for arrest of judgment that the declaration is entitled generally of a term, and the cause of action appears to have arisen on a subsequent day in the term. *Williston v. Pierce*, 2 *All.* 162.

**7—Ambiguity in pleading—Construction against party pleading.**

In pleading, if the words are equivocal, and two meanings present themselves, that construction shall be adopted

which is most unfavorable to the party pleading. See Supra I. *Bank of Nova Scotia v. Estabrooks*.

**8—Replying and demurring.**

It is doubtful if a plaintiff can reply to defendant's pleas, and afterwards demur to both the pleas and rejoiners. *Hanington v. Girouard*, 3 Pug. 151.

**9—Several Pleas—immaterial issues on some—Non-suit.**

Where defendant pleaded four pleas, two of which were an answer in law to plaintiff's action, and he was non-suited. *Held*, on motion to set aside the non-suit that he was not entitled to have finding of the jury on the other issues, they being immaterial. See Insurance 44.—*Martin v. Mutual Fire Ins. Co.*

**10—Policy of insurance—Joining issue on plea—Sufficiency of proof—Waiver cannot be shewn.**

See Same case.

**11—Count—Assumpsit set out and trespass—Introductory part of count may be rejected as surplusage and become count in trespass with other counts in declaration.**

One count of a declaration set out in minute detail the terms of an agreement of letting a farm, and then alleged that defendant wrongfully and improperly without the license of plaintiff and against his will and contrary to defendant's said agreement, broke and entered in and upon the premises leased, and seized, took and carried away certain goods and chattels and converted and disposed thereof to his own use, there were other counts in tort and it being objected that there was a misjoinder; *Held*, That all the introductory part of this count could be rejected as surplusage, and it would then be a count in trespass. *Clarke v. Harding*, 11 P. & B. 495.

**Joinder of counts.**

Joining counts in detinue and assumpsit is a misjoinder, and is a ground of general demurrer.

*Quære*, Whether such a defect is cured by pleading over.

See Pleading II 54. *Allen v. Bank of N. Bk.*

**Joinder of actions.**

*See* Action at Law XII.

**Cause referred to Arbitration—Award made—No revocation of authority—Defendant not compelled to plead award—Court will stay on motion subsequent action.**

*See* Arbitration 17, *Milner v. Brydges*.

**12—No traverse.**

The principle of the Common Law Procedure Act, is that, whatever is not traversed is admitted. *Bank of Nova Scotia v. Morrow*, 2 *Pug.* 460.

**Corporation.**

In an action brought by plaintiffs in their separate name against defendants as endorers of a promissory note, the defendants pleaded no endorsement and want of presentment. *Held*, That under these issues, plaintiff not bound to prove their incorporation. *Ibid*.

**Estoppel—when not necessary to be pleaded but relying on same in evidence.**

*See* Estoppel I. 29.

**When judgment not pleaded is estoppel—Party relying on judgment recovered should plead it.**

*See* Estoppel IV. 1.

Estoppel by record must be pleaded, otherwise it is waived. *Miller v. Weldon*, 2 *Han.* 188.

**Amendments in pleading.**

*See* Amendment.

**Demurrer—Withdrawing same after being over-ruled.**

*See* Criminal Law I. 11. *Reg v. Mailloux*.

**Immaterial issues—When defendant not intitled to have finding of jury upon.**

*See* Non suit 12. *Martin v. M. Fire Ins. Co.*

**Son assault demesne—Evidence under—Replication not necessary.**

*See* Evidence III. 98. *Savage v. Stack*

**PLENE ADMINISTRATIVIT.**

*See* Executors and Administrators.



**POLICE.**

*See* Action at Law. (Notice.)

**POLICY OF GUARANTEE.**

*See* Pleading II. 5.

**POLICY OF INSURANCE.**

*See* Insurance.

**POND-KEEPER.**

*See* Lien—Contract 2.

**Liability—Custom.**

The defendant, a pond-keeper, agreed to receive in charge all the plaintiff's logs, and to provide sufficient warps to secure them, and to deliver them at the plaintiff's mill, at the rate of one shilling per thousand superficial feet; but if he allowed the rafts to be broken up, so they would have to be re-raftered, only nine pence per thousand was to be paid. It was proved that there was no custom in the lumber trade making a pond-keeper liable as an insurer. *Held*, That the defendant was not liable either under the terms of the contract, or construed by the usage of the trade, for logs lost by a storm, and without any want of care on his part. *Brown v. Cunard*, 3 All. 316.

**POOR, OVERSEERS OF.**

*See* Overseers of Poor.

**PORTLAND, TOWN OF.****Civil Court—Town of Portland.**

The proceeding by review according to 1 Rev. Stat. cap. 137, does not apply to a judgment of the Civil Court of the Town of Portland, under the Act 34 Vic. cap. 11, sec. 99. *Ex parte Moore*, 1 Pug. 333.

**PORTLAND CIVIL COURT.**

Civil Court in Portland has jurisdiction in actions for sums over \$20 when the debtor resides in the Town of Portland or in the Parishes of Simonds and Lancaster, even though the debt was contracted elsewhere.

*Quare*. Whether in actions in said Court for sums under \$20 it is not necessary that either plaintiff or defendant should reside in Portland. *Ex parte Shepherd*, 2 Pug. 474.

**Review from, in cases §20.**

As the Police Magistrate of the Town of Portland when trying civil Causes in actions of debt under twenty dollars, acts by virtue of his commission as a justice of the peace, a judgment obtained before him in such a case is subject to review before a Judge. *Ex parte Linton*, 2 *Pug.* 412.

**Cases over §20.**

The proceeding by review according to 1 Rev. Stat. cap. 137, (Consol. Stat. cap. 60,) does not apply to a judgment in the Civil Court of the Town of Portland under the Act 34, Vic. cap. 11, sec. 99, where the amount is over \$20. *Ex parte Moore*, 1 *Pug.* 333. (See New Consol. Stat. cap. 60, sec. 59.)

**POSSESSION.****Confinement of Possession.**

See Limitation of Actions IV. 2, 4.—Crown Grant.—Ejectment.

**Trespass—Sufficient possession to maintain action.**

See Trespass I. 10, 22, 23.

**Trespass—Glebe property.**

See Trespass I. 8.

**Possession enuring to benefit of heirs.**

See Trespass II. 28.

**Prior possession—Wrong doer.**

See Ejectment I. 7.

**Timber—Possession—Seizure by Crown—Title against other parties.**

See Trover 9.

**Shewing no right to immediate possession.**

See Ejectment II. 7.

**Wilderness land,**

No fixed principle of title by possession of wilderness land to govern all cases. *Coates v. McAuley*, 4 *All.* 521.

See Trover 22, same case.

**Demand of possession, determining estate.**

See Tenant at Will 3.

**Crops—**

*See Trespass II. 23.*

**Ejectment by heir without demand of possession.**

*See Ejectment.*

**1—Title by prior possession —Disseisin, question for jury.**

The lessor of the plaintiff claimed under a deed from P. in 1838, and shewed a documentary title and actual possession in those under whom he claimed, as far back as 1820. The defendant claimed under a deed from S. in 1828, and proved actual possession since that time. S. did not appear to have had any right, and the defendant since the conveyance from S. had applied to P. to purchase the land. *Held*, That the lessor of the plaintiff had shewn a *prima facie* title by prior possession; and the question of disseisin having been left to the jury, the Court refused to disturb a verdict for the plaintiff. *Doe v. Hatheway*, 2 *All.* 69.

**2—Grantee of Crown—Nature of possession.**

A grantee from the Crown is deemed to be in possession while the land remains unimproved and unoccupied. *Doe v. Chace*, 3 *All.* 501.

The possession of one who enters upon land wrongfully is confined to that part of which he has the actual and exclusive occupation. *Ibid.*

**3—**Plaintiff and defendant occupied adjoining lots for twenty years by a line and fence extending from the front through the cleared land. *Seemle*, That in the absence of any actual possession beyond the clearing, it must be considered that the possession from thence to the rear of the lot, was intended to be a continuation of the line in the front. *Belyea v. Belyea*, 3 *All.* 588.

**4—Possession of widow after death of husband—For whom holding.**

A. having been in possession of land fourteen years, died leaving a widow and one child, (the lessor of the plaintiff who was married and not living with her father;) the widow remained in possession about eight years, when the

defendant entered. *Held*, in the absence of evidence for whose benefit the widow was holding, That it could not be presumed that she was holding for the heir, and therefore that her possession could not be added to that of A. to make out title in the lessor of the plaintiff. *Doe v. Woodworth*, 3 *All.* 577.

*Quære*, Whether, if the heir had been an infant, the widow might not be presumed to hold as guardian in socage. *Ibid.*

#### **5—Sufficiency of possession—Crown grant.**

Where title is claimed under a Crown grant, which is resisted on the ground that the Crown was out of possession at the time the grant issued, and there is evidence of continuous acts of prior possession of the land, adverse to the Crown, for twenty years, such evidence should be left to the jury; but, in order to prevent a Crown grant from taking effect, on that ground, the possession should be defined, actual, and continuous: mere acts of lumbering on Crown land from year to year, without any apparent bounds, are not sufficient. *Smith v. Morrow*, 1 *Pug.* 200.

#### **Sufficiency of possession—Unregistered deed.**

*See* Trespass I. 8.

*See* further—Deed, Ejectment, Limitation of Actions, Trespass.

#### **Possession under Mortgagee good as against Mortgagee and any person claiming under him.**

*See* Mortgage. *Doe d. Harding v. Hanson*.

#### **6—No documentary or other title—Finding of Jury.**

As between parties without documentary title or other title but possession, each party seeking to make out a title for himself, the Court will not interfere with the finding of Jury unless clearly and unequivocally wrong.

*Estabrooks v. Brean* 2 *Pug.* 804.

#### **POSTEA.**

*See* Amendment III. 5.—Replevin 4.

When a *postea* has been stayed by a Judge's order, the clerk of the circuits should not deliver it out to either party

without a rule of Court or Judges order. *Steeves v. Wilson*, 2 Pug. 492.

**POSTMASTER.**

**Exemption from highway labour.**

*See Commissioner of Highways v. Phair*, Ber. 871.

**POST OFFICE.**

**Presumption of letter reaching destination.**

*See Bills and Notes IV. 7.*

**POUNDAGE.**

*See Sheriff.*

**POUND-KEEPER.**

*See Impounding.*

**POWER OF ATTORNEY.**

**Extent of authority.**

A power "to make and execute any note, bond or bonds or other instruments, or contract, and to make, execute and acknowledge all contracts, orders, deeds, writings, assurances and instruments which may be requisite or proper to effectuate all or any of the premises," will not *prima facie* authorize the attorney to accept and execute leases of real estate containing burthensome covenants on the part of the lessees. *Mayor of St. John v. Lockwood*, 2 Kerr 448.

**Agent's Authority.**

*See Principal and Agent 6, 7.*

**Execution of—Affidavit.**

*See Attachment 16.*

**Proof of.**

*See Deed I. 14.*

**Demand of costs—Power of attorney.**

*See Attachment.*

**Power to sell by will.**

*See Will 82. McLeod v. Frith.*

**Conveyance by deed to trustees under power of attorney.**

*See Deed III. 5.*

**Delegatory of powers.**

See Executors, &c. I. 7.

**POWERS OF LEGISLATURE.**

See Legislative Acts.—British North America Act.

**PRACTICE.**

- I. DECLARATION.
- II. VENUE.
- III. ENTRY DOCKET.
- IV. PROCESS—SCIRE FACIAS—SERVICE OF PAPERS, &c.
- V. MOTIONS AND APPLICATIONS.
- VI. STAYING AND SETTING ASIDE PROCEEDINGS, WHEN GRANTED OR REFUSED.
- VII. IRREGULARITY.
- VIII. RULES.
- IX. NOTICES.
- X. INQUIRY (WRIT OF).
- XI. DEMURRER.
- XII. FEIGNED ISSUE.
- XIII. ARREST OF JUDGMENT.
- XIV. INCIDENTAL PROCEEDINGS.

**I.****DECLARATION.****1—Filing.**

A declaration may be filed *de bene esse*, within thirty days after the last return day of the term at which the writ is returnable. *Pearson v. Kierstead*, Mich. T. 1865.

2 ——— Under the rule of East T. 25 Geo. 3, a declaration must be filed in all cases; and the time for pleading does not begin to run until it is filed. Therefore, where a copy of the declaration was delivered to the defendant's attorney on the 26th July, but the declaration was not filed till the 30th, a demand of plea cannot be made till after the expiration of twenty days from the day of filing. *Cassmore v. Turner*, C. Ms. 108.

**3—Entitling.**

Entitling a declaration generally of Trinity term, where the writ is returnable on the last day of the term, and the cause tried in vacation before the next term, is only an

irregularity, which is waived by pleading and going to trial though strictly, the *venire* would not be returnable till Michaelmas term. *Woodward v. McRae*, Mich. T. 1834.

#### **4—Counts—Distinct Causes.**

The several counts of a declaration are considered as a distinct cause of action; and if only one count is demurred to, the Court cannot notice any defects in the other counts. *Crawley v. Wilson*, 1 All. 704. See Pleading I.

#### **5—Copy delivered—Correctness—Presumption.**

It is presumed that the copy of the declaration delivered is a true transcript of the declaration on file, and the defendant's attorney is not bound to make a comparison. *Brocheau v. DesBrisay*, 4 All. 122.

## **II.**

### **VENUE.**

#### **1—Right to lay venue—Change of—Restoring.**

The Court will not change the venue from one county to another, where the cause of action accrued partially out of the Province. *Dempster v. Stewart*, 1 Kerr 108.

2 ——— The venue in a cause was laid in the county of Y., issue was joined and notice of trial given for that county, and afterwards countermanded; an application on the part plaintiff to change the venue from the county of Y. to the county of N., on affidavit that one material witness to prove the plaintiff's case resided in the county of R., and two others in N., was refused with costs, no other special reason being stated. *Commercial Bank v. Williston*, 2 Kerr 507.

3 ——— The venue may be changed upon the ordinary affidavit, in an action on a written agreement in the nature of a guarantee. *Rowell v. Emmerson*, 2 All. 455.

Where, after a cause of action has arisen, the county is divided, and an action is brought in a different county, the affidavit to support a motion to change the venue should state in which division of the county the cause of action arose. *Ibid.*

4 ————The venue in a cause was laid in Northumberland, but the presiding Judge at the Circuit being connected with the plaintiff, declined to try it. The plaintiff then applied to change the venue to Kent, and obtained an order to do so, with leave reserved to the defendant to apply to bring it back to Northumberland. Defendant then obtained an order on the common affidavit to restore the venue to Northumberland. *Held*, That as this was the first opportunity defendant had of applying to change the venue the order was properly made. *Rankine v. Letson*, 1 *Han.* 29.

5 ————Though the venue is changed on a false affidavit, the plaintiff cannot bring it back to the county where it was first laid, without the usual undertaking to give material evidence in that county. *Nevers v. Travis, East.* T. 1884.

6 ————Where the venue was changed from A. to B., on the usual affidavit that the cause of action arose wholly in B., when in fact part of it arose in another county, the Court refused to bring the venue back to A.,—the plaintiff not being able to give material evidence in that county. But see next case. *Ibid.*

7 ————Where a cause of action arises in more than one county, or out of the jurisdiction of the Court, the plaintiff may lay his venue where he pleases; and where the venue, in such a case had been changed from W. to Y., on the usual affidavit, it was restored on the plaintiff undertaking to give material evidence of some matters arising outside of the county of Y. *Ketchum v. New Brunswick Railway Co.*, *Hil. T.* 1873.

See Criminal Law 8, 14, 15.

### 8—Venue — Application to change—Convenience—Expense.

Where on an application to change the venue, it appeared that the change would be a convenience to the defendant, whose witnesses all resided in the County to which the venue was proposed to be changed, but that it would be less expensive to the plaintiff to try the cause in the County where he had laid the venue the Court refused to interfere. *Carvill v. St. John, Ins. Co.* 3 *All.* 481.



**9—Common affidavit — Judge ordering venue to be changed to other county than one sought for.**

Where an application is made to change the venue on the common affidavit, and the plaintiff in answer to the summons, shows that the cause of action did not arise in the county to which the venue is sought to be changed, the Judge has no right on that application to order it to be changed to a different county, even though the plaintiff's affidavit disclosed that the cause of action arose there. *Craig v. Glazier*, 1 P. & B. I.

**10**——Where party has previously been allowed to come in and defend on terms of taking short notice of trial. Application for change of venue only a short time before circuit not granted. See *Reid v. Leonard*, 2 Pug. 85.

**11**——Application to change venue should be made at Chambers before Judge. Court refused to entertain motion. *Fawcett v. Allen*, 2 Pug. 349.

### III.

#### ENTRY DOCKET.

**1—Allowing filing of writ.**

Where a writ was returnable in Michaelmas term, but the cause was not entered, in consequence, as the plaintiff alleged, of his being unable to obtain the affidavit of the service of the writ, and the defendant appeared within thirty days after the return of the writ, and negotiated with the plaintiff for a settlement, which was not effected, the Court refused, after the lapse of two terms, to allow the plaintiff to file the writ and entry docket. *Wetmore v. Briggs*, 4 All. 590.

**2—Entry of cause—Excuse for non-entry.**

A writ was returnable in Trinity Term 1858, but the cause was not entered. The suit was defended and a verdict given for the plaintiff, which was affirmed in Easter Term 1860, after a motion for a new trial. The Court refused in the following term to allow the cause to be entered and the judgment signed, though the plaintiff's attorney swore that the omission to enter the cause was an oversight, and not from any intention of violating the rule of Court. *McAuley v. Geddes*, 4 All. 591

**3—Insufficient excuse.**

The Court refused after trial and verdict for the plaintiffs, to allow a cause to be entered, though the defendant's attorney consented; the only excuse alleged for not entering it at the return of the writ, being that the plaintiff's attorney expected it would have been settled. *Doherty v. McGrath*, Hil. T. 1866.

**4—Judge allowing entry docket to be filed as of previous term.**

A writ was issued in this cause in May 1872 returnable in the following Trinity Term. The process was issued in order to save the Statute of Limitations and was returned *non est*. About the 6th of August then next, the writ was filed with the clerk but no entry docket was filed. At a subsequent stage in the cause the plaintiff obtained from a judge at chambers an order for leave to file the entry docket as of Trinity Term 1872. A motion being made to the Court to set aside this order, the application was refused. *Taylor v. Gerow*, 2 Pug. 364.

**Writ issued — Continuance — Subsequent service — Judge's order to file writs, &c.**

A Judge's order was obtained on July 13, 1868, to hold defendant to bail in which a *capias* issued returnable in Michaelmas Term following, but which was not served. Subsequently *alias* and *pluries capias* issued, but the defendant was not arrested.

The affidavit on which the order for bail was made was not filed and could not be found. No entry was made of the cause until July 19, 1872, when an entry docket and the writs were filed as of Michaelmas Term 1865, under a judge's order. A third *pluries capias* was issued on July 12, 1872, on which defendant was arrested and gave bail.

An application being made to rescind the latter order, and also to enter an exoneretur on the bail piece and discharge the defendant out of custody. *Held* 1st. That process having issued within a year after the swearing of the affidavit, the arrest being made on a writ which was a con-

tinuance of the first was good, though it took place several years afterwards. 2nd. That, though the first writ should have been returned and the cause entered in Michaelmas Term 1865, the Judge had power to order the cause to be entered *nunc pro tunc* and the Court refused to set it aside. *Pulner v. Dinsmore*, *Pug.* 150.

**Cause struck off special papers—Re-entry of.**

See *Infra* XIV. *Milner v. Bridges*.

**Refusal to allow entry of cause—Insufficient excuse for new entry.**

See *Entry of cause*.

IV.

PROCESS. SCIRE FACIAS. SERVICE OF PAPERS, &c.

PROCESS—SCIRE FACIAS.

**1—Ac Etiam—Omission.**

If a bailable writ states no cause of action in the *ac etiam* clause it is an irregularity for which the bail bond may be set aside, but the irregularity is waived by the party putting in special bail. *Campbell v. Lowden*, 1 *All.* 489.

1 *a* ——— Summons issued against a corporation under the Act 12 Vic. cap. 89, sec. 16, should state cause of action truly. See *Corporation* 20.

2 ——— A *ca. sa.* differing in the amount only from the judgment upon which it is issued, is not void, but only irregular. *Spence v. Stewart*, *Ber.* 219.

**3—Scire Facias—Suit of Crown.**

The writ of *scire facias* issued at the suit of the Crown, is not a prerogative writ; and therefore the Act 2 Wm. IV, c. 20, abolishing the proceedings by two *nihilis*, and substituting a service of the writ instead, applies to suits of the Crown. *Reg v. Hammond*, 3 *Kerr* 181.

*Semble*, That in a writ of *scire facias* issued upon an inquisition taken upon a bond given to the Board of Ordnance, it is sufficient briefly to recite the proceedings on the inquisition, and set out the penalty of the bond, without assigning breaches; also, that the bond being in effect

joint and several, each obligor may be proceeded against separately. *Ibid.*

**4—Scire Facias—To repeal Letters Patent—Averments.**

A *scire facias* at the instance of a private prosecutor, to repeal letters patent, can only issue on the fiat of the Attorney General, who may withhold his assent if no sufficient ground is shewn. A draft of the writ and a statement of the facts on which it is founded should be laid before the Attorney General, and if he is disqualified from acting, the Solicitor General or a Crown lawyer should decide on the application. *LeGal v. Duffy* 3 All. 57.

Letters patent were granted to B. in 1841, subject to forfeiture if he or his assigns did not commence effectual mining operations within two years; in 1852, B. assigned to the plaintiff, who sued out a *scire facias* to repeal a grant of the same rights made to D. in 1850. *Held*, That the *scire facias* should aver that the conditions of the first grant had been performed, or that the Crown had dispensed with, or waived such performance. *Held* also, That the defendant might traverse such averments by pleas. *Ibid.*

The Act 13 Vic. cap. 32, (if applicable to such a case) does not take away the right of pleading. *Ibid.*

**5—Scire Facias—Necessary Statements—Joint Debtors—Pleading.**

Every writ of *scire facias* should state the particular circumstances which entitle the party to the remedy sought, so that in the case of an ordinary *scire facias* under the Statute of Westminster the party would not be entitled to an execution against a joint debtor not brought into Court in the original action or under the Act of Assembly, 26 Geo. III, cap. 24, and nothing which might have been pleaded to the original action can be pleaded to such ordinary *scire facias*. *Johnston v Tibbetts, et al.*, Ber. 356.

**6—To revive judgment—Joint debtors.**

A *scire facias*, in the ordinary form of that writ to revive a judgment against two defendants, where no execution has issued within a year and a day, is a sufficient *scire facias* under the Act 26 Geo. III, cap. 24, to obtain execution against

the separate property of one of them, who had not been served with process in the original action. *Berton v. Brown, Trin. T. 1831.*

**7—Execution issued within a year.**

A *scire facias* to revive a judgment, is not necessary where an execution has been issued within a year and suspended at the request of the defendant; although such execution has not been returned and filed. *Betts v. Johnson, Trin. T. 1832.*

**8—Scire Facias—Judge's order.**

If the service of a writ of *scire facias* is not personal, there must be a Judge's order to perfect it. *Wetmore v. Levi, 5 All. 55.*

**9—Scire Facias ad audiendum—Issue—Time of.**

It is not necessary that a *scire facias ad audiendum* should issue in the same term in which the writ of error is returnable. *Ibid.*

**10—Issue of writ—Teste and delivery—Certificate of Attorney.**

Where a writ was made out and tested on the 11th June and remained in the Attorney's Office until the 25th, when he served it on the defendant. *Held*, that it was not issued until the 25th, and the attorney having taken out his certificate before that day, though after the writ was made out, the writ was valid. *Seely v. Bliss, 1 P. & B. 53.*

**11—Capias under Consol. Stat. Cap. 38, sec. 1—Endorsement.**

It is not necessary that a *capias* issued under Act 38, Vic. cap. 4, sec. 2. (Consol. Stat. 38, sec. 1.) Should be endorsed with a statement of the cause of action in addition to the amount due. *McIntosh v. Burnett 2 Pug. 253.*

**12—Continuation of Writ—Arrest.**

Process issued within a year after the swearing of the affidavit, arrest made on a writ which was a continuation of the first writ, good. Judge no power to order filing *nunc pro tunc.* *Palmer v. Dinamore, 2 Pug. 150.*

**Altered Writ—Day of alteration considered the issuing of writ**

See Limitation of Actions III. 1, 2.

**Necessity of Re-sealing.**

See Alteration 2.

**Judge's order for perfecting service—Setting or refusing to set aside.**

See Practice VI.

**SERVICE OF PROCESS—NOTICES—RULES—DECLARATION.**

**13**———When service not personal, the affidavit should state the name of the person served. *Sandall v. Godsoe*, 1 *All.* 441.

**14—When not personal—Judge's order.**

Where a writ was not served personally, and no Judge's order was obtained to perfect the service according to the Act 7 Wm. IV., cap. 14, sec. 1, and the defendant denied any knowledge of the suit, a judgment and execution were set aside for irregularity, though the defendant's affidavit of ignorance of the suit was contradicted by his admission since his arrest. *James v. Dupres*, 1 *All.* 506. 13

**15—Agent of attorney.**

Under the practice of the Court, service cannot be made of papers on the Fredericton agent of an attorney, resident in Saint John, unless the agent be specially authorized to receive such service—the rule of Court requiring attorneys, not resident at Fredericton or Saint John, to have agents at either place, may be considered obsolete. *Hatch v. Scoullar*, 1 *Kerr* 571.

**16—Service of rule nisi.**

Irregularity waived by entering cause on special paper and appearing by counsel. *Barlow v. O'Donnel*, 1 *All.* 448.

**17—Summons—Service of—Militia.**

A summons from a captain of militia in a proceeding to remove a fine for non-attendance, under Act 6 Geo. IV, cap. 18, sec. 12, is not well served if left at the dwelling house of the party in his absence, and not received by him in time. *Ex parte Ritchie*, 2 *Kerr* 75.

**On foreign Corporation—Affidavit.**

*See* Corporation 20.

**SERVICE OF NOTICES—RULES—DECLARATIONS.**

**18**———Service on a clerk is insufficient, unless at the office or dwelling house of the attorney. *Moulton v. Dible, Ber.* 128. *See* General Rules, 106, 108.

**Declaration—Ejectment.**

*See* Ejectment.

**19—Affidavit of service.**

Where the affidavit stated service of motion to have been on B. W. H. without stating that he was the party's attorney. *Held*, insufficient. *Brown v. Bartlet, 3 Kerr* 869.

**20—Excuse for not serving.**

Where a rule *nisi* has not been served some reason must be shewn for the omission to induce the court to enlarge it—and the application should be made in the term in which it is returnable. *Donoghue v. Todd, 1 All.* 598.

**21—Bill against attorney.**

In general the service of copy of bill on attorney should be personal; service on a clerk at his office, without his authority to receive, it, and refusal to accept service, the attorney being absent from county is not good. *Sayre v. Gilbert, 2 Kerr* 225.

**Acceptance by authority—Delay in application to set aside proceedings.**

*See* *Infra* VI. 28.

**22—Notice of motion.**

In cases of motion requiring 14 days' notice before the term at which the motion is intended to be made, the day of service is considered as one of the days. *Jarvis v. Peck, 2 Kerr* 507.

**Setting aside proceedings for defect or irregularity in service.**

*See* *Infra* VI.

**Service of notice on Student—Requisite affidavit.**

Affidavit of service of a notice of motion "on a student in the office of plaintiff's attorney" not sufficient, it not stating that the service was at the office. *Ber.* 342.

**23—Service on agent of defendant living out of the province—Plaintiff and Agent same person—Chapter 37, Consol stat. sec 9.**

The plaintiff was the agent of the defendant who lived out of the province. The plaintiff caused writs of summons and attachment to be issued against the defendant and to be served upon himself as agent for the defendant under section nine of chapter 37 of the consolidated statutes, and thereupon communicated to the defendant the fact of the issue of the writs and of the service thereof. *Held*, That the service was bad, as it would be contrary to reason and natural justice to apply the section to a case where the agent was himself the plaintiff to the suit. *Held*, by Allen, C. J. Weldon, Wetmore, and Duff, J. J., (Fisher diss) that the service was not a mere irregularity, but was wholly defective, and that the case ought not to be governed by the ordinary rules relating to waiver of irregularity. *Parrot v. Roberts*, 2 P. & B. 388.

**24—Process—Service on company.**

In an action against incorporated company, if the service of process was on, or the attorney entering appearance was authorised by, other than the duly qualified officers of the company proceedings will be stayed without payment of costs. *Spurr v. Albert Mining Co.*, 2 Pug. 260.

**25—Summary conviction—Service of summons.**

An endorsement on summons to appear before sessions to answer charge of selling liquors without license "notice to appear was served on defendant," held not sufficient but that the clerk should have entered how the service was proved and when and how it was made. *Regina v. Golding*, 2 Pug. 385.

**26—Conviction—Service of, not necessary.**

It is not necessary, before a defendant, convicted of an



assault, is imprisoned, that he should be served with a copy of the minute of conviction. *Regina v. O'Leary*, 3 *Pug.* 231.

**27—Service of Notice on student—Insufficient statement.**

Affidavit of service of a notice of motion "on a student in the office of plaintiff's attorney" not sufficient, it not stating that the service was at the office. *Carliff v. Robertson*, *Ber.* 342.

**28—Judge's order.**

It is not necessary to serve a Judge's order and demand costs before moving to make it a rule of court. *Bell v. Moffat*, 2 *P. & B.* 406.

**29—Public Holiday—Service of paper on Queens' Birthday.**

The service of a paper upon an attorney on the Queen's Birthday is good. *Upton v. Phelan*, 2 *P. & B.* 192.

V.

MOTIONS AND APPLICATIONS.

**1—Entry on motion paper—Obtaining costs.**

Where a notice of motion has been given pursuant to a rule of Hil. T. 6 Wm. IV, and the party giving it does not enter the case on the motion paper; the opposite party, in order to obtain the costs of preparing to resist the motion, must apply to the Court for leave to enter the cause, on the second day of the term for which the notice was given. *Seelye v. Williams*, 1 *All.* 442.

2—Where a cause has not been entered on the motion paper according to notice, the party to whom such notice was given may apply to the Court for leave to enter it, in order to obtain costs, immediately after the motion paper is finished. *Jones v. Snodgrass*, 1 *All.* 603.

**3—Notice of appeal—No entry—Costs.**

Where notice of appeal from the judgment of a Judge in Equity is given, and the case is not entered on the appeal paper, the opposite party may move to have it entered and dismissed with costs. *Duncan v. Reynolds*, 2 *Han.* 187.

**4—Entry—Counsel's duty.**

It is the duty of counsel to see that rules obtained by them are properly entered in the minutes of the Court. *Ex parte Glass*, 2 All. 88.

**5—To rescind Judge's order—Delay.**

An application to the Court to rescind a Judge's order the fifth term after it was made, in the interim there having been several proceedings between the parties in relation to the case, was held too late, though the same objection might not apply to an application to amend the consent rule. *Doe dem Hill v. Todd*, 3 Kerr 295.

**5 a—Judge's order granting leave to appeal—Finality of.**

The order of a Judge made in vacation, granting leave to appeal to the Queen in Council, and settling the terms on which the appeal will be granted is final, and cannot be revised or rescinded by the Court. *Allen J., dubitante. Domville v. Kevan*, 2 Han. 175.

**5 b—Applying to set order aside.**

Where a Judge makes an *Ex parte* order an application should be made to him to set it aside before applying to the Court. *Jarvis v. Burns*, 3 Pug. 327.

**6—Relief—Crown bond—Scire facias.**

Where the Attorney General had instituted a suit on behalf of the Crown, by *scire facias*, on a treasury bond, conditioned for the payment of duties, the Court refused, upon a summary application on affidavits for relief under the Statute 33 Hen. VIII. cap. 39, to determine the question as to the defendant's liability, the defendant not having pleaded to the *sci. fa.*, and the Attorney General not assenting to the application. *Regina v. Street*, 1 Kerr 878.

7 ————Relief of Insolvent confined debtor, notice and copies of affidavits being served, rule absolute. *See Wilmot v. Babino et. al*, Ber. 62.

8 ————Counsel making motion in Court is bound to state on whose behalf he moves. *See Gillespie v. Fogarty*, 1 Kerr 162.

**9—Application for attachment—Time.**

Attachment against witness for not attending on sub-

poena must be applied for at the next term after the contempt is committed. *See* Attachment 9.

**10—To enlarge rule—Time.**

Application to enlarge a rule should be made at the term in which it is returnable. *See* *Donoghue v. Todd*, 1 *All.* 598.

*See* Enlarging Rule.

**11—** Motion to enlarge rule *nisi* for attachment against a witness for not obeying a subpoena on the ground that he could not be served with the rule, must be made at the term in which the rule *nisi* is returnable. *See* *Abbot v. French*, 3 *Kerr* 368.

**12—For new trial.**

*See* New Trial.

**13—Equity side.**

Where an issue is sent down for trial by the Equity side of the Court, under 17 Vic. cap. 18. sec. 18, (2 R. S., p. 80,) a motion for a new trial must be made before a Judge in Equity. *Hodge v. Reid*, 1 *Han.* 89.

**14—Venire de novo.**

Motion for may be made in the same manner as for a new trial. *See* *Pelton v. Temple*, 1 *Han.* 274.

**15—Arrest of judgment—Criminal trial.**

Objections on motion are confined to the questions in the case stated by the Judge under the Act 1 Rev. Stat. cap. 150, secs. 22, 23. *Reg. v. Fennety*, 3 *All.* 132.

**16—Mandamus—Affidavits—Entitling.**

Affidavits used on motion for a rule *nisi* for a mandamus are irregular if entitled in a cause; but the rule will be discharged without costs. *Reg. v. Justices of York*, 1 *All.* 90.

**17—Second application for mandamus.**

Where an application for a mandamus failed because there was no sufficient demand to perform the act, which the applicant claimed to have done, it cannot as a general rule be renewed after a sufficient demand though there may be circumstances warranting a departure from this rule. *Regina v. Commissioners of Sewers, St. John*, 1 *Han.* 3.

**18—Several causes—Single affidavit.**

Where the same rule is to be moved for in several causes, the motion may be made on a single affidavit entitled in all the causes. *Brown v. Trenholm*, 2 All. 515.

**19—Attorney.**

Some reason should be given for striking an attorney off the roll even on his own application. *Ex parte McCully*, 1 Kerr 521.

**20—Costs—Depriving plaintiff—Default case.**

Where the defendant suffers damages to be assessed and final judgment signed for a debt over £5, the Court will not entertain a motion to deprive the plaintiff of costs, on the ground that a payment had been made before action brought whereby the debt was reduced below £5. *Bennet v. Morse*, 2 Kerr 624.

**21—Attorney—To pay over proceeds of judgment.**

The Court will not, on summary application, compel an attorney to pay over the proceeds of a judgment to a person claiming as assignee, unless his right is clear. *Murray v. Johnston*, 1 All. 697.

**22—Bail.**

Bail cannot plead to an action on recognizance, a reference of the original suit to arbitration,—they should apply to have an exoneretur entered on the bail piece. *Sharp v. Connell*, 3 Kerr 125.

**23** ——— Entitled to have exoneretur entered when variance between affidavit and cause of action. See Bail 12.

**24—Bail—After pleading—Affidavit.**

Bail cannot, after pleading that no *ca. sa.* duly issued against the principal, and while that plea stands, apply to the Court to set aside the proceedings for irregularity, on the ground that the execution did not remain in the Sheriff's office four days. *Fulton v. Andrews*, 2 All. 359.

After failure of such an application, a motion to withdraw the plea and set aside the execution for the same irregularity, was refused. *Ibid.*

**25** ——— In an application to discharge the bail in a

suit, on the ground of delay in the plaintiff's proceedings, it must be sworn that the application is made on behalf of the bail. *Ritchie v. Porter*, 2 All. 360.

**26** ———— *Quere*, Whether it is too late for bail to object to the sufficiency of an affidavit, after the time for putting in bail has expired, if they did not see it before that time. *Simonds v. Simonds*. 2 All. 468.

**27—Equitable jurisdiction—To set aside receipt.**

The Court will not entertain an application to its equitable jurisdiction, by an assignee of a chose in action, to set aside as fraudulent a mere matter of evidence, such as a receipt, which has not been pleaded to the action. *Goss v. Messinett*, 3 Kerr 225.

**28—Time—Service of notice.**

In cases of motion requiring fourteen days' notice before the term at which the motion is intended to be made, the day of service is considered as one of the days. *Jarris v. Peck*, 3 Kerr 507.

**Leave to withdraw plea—Discontinuing replevin suit.**

*See Replevin.*

**29—Attachment for costs in Equity—Application by sureties.**

Where action is brought in Supreme Court on a limit bond given by a prisoner in custody on an attachment for costs in Equity, application for relief by the sureties must be made to the Supreme Court. *Bartlett v. Glasgow, Hil. T.* 1871.

**30—Interlocutory Judgment—Motion to set aside—Regularity.**

The plaintiff having demurred to the defendant's plea, delivered a copy of his demurrer to the defendant's attorney, received from him a joinder in demurrer with objections, and gave him notice of setting down the case for argument, whereupon the demurrer book of the defendant was made up and delivered; but the plaintiff, discovering that the defendant's papers in the cause were not on file, signed interlocutory judgment; subsequent to which the attorney of the defendant who had been in default for non-

payment of Court fees, purged his contempt by paying up the fees, and procured a Judge's order to the clerk to receive his papers. On motion to set aside the interlocutory judgment for irregularity, so signed after the several steps taken. *Held*, That the signing of the interlocutory judgment was regular, the contempt of the attorney being no excuse for the wrong. *Held* also, per Street, J., that the subsequent steps did not amount to a waiver of the irregularity, the plaintiff having been in the dark as to the circumstances afterwards discovered. *Partelow v. Smith*, 3 *Kerr* 349.

### **31—Delay.**

Where a defendant delayed until the last day of the third term before making application to set aside an interlocutory judgment, and prior to the application the intermediate steps had been taken, of which his attorney had notice respectively, and upon which final judgment was signed. *Held*, That the application was too late either to set aside the interlocutory judgment and subsequent proceedings for irregularity, or to let the defendant in upon the merits. *Kelly v. Wilson*, 3 *Kerr* 471.

### **32—To set aside award—Time.**

A motion to set aside an award under a submission, with a clause of consent to make it a rule of Court, must be made before the last day of the term next after the award is published. *Nugent v. Brown*, 2 *All.* 621.

### **33—Certiorari.**

On application to a Judge at Chambers for a *certiorari*, there should be a summons or rule *nisi* in the first instance. *Ex parte Howell*, 1 *All.* 584.

### **34—Application to Court pending application to Judge.**

Where a defendant has applied to a Judge at Chambers to set aside an arrest on the ground that there is no *ac etiam* clause in the writ, he may afterwards, and while that application is pending, apply to the Court to rescind a Judge's order for bail in the case, on the ground that the affidavit to hold to bail is defective (*Fisher, J., dissentiente*) *Nevins v. Cole*, *Hil. T.* 1871.

**35—Quo Warranto—Application for—Withdrawing facts.**

Where a party applying for a *Quo Warranto* improperly withheld material facts, which ought to have been stated in his affidavit, the rule was discharged with costs. *Ex parte Gilbert*, 1 *Pug.* 231.

**36—Warrant of Attorney—Leave to enter up.**

On motion in *banc* for leave to enter up judgment on an old warrant of attorney, it must be shewn that the defendant was alive within the term at which the motion is made. *Wiley v. Haslip*, 1 *Kerr* 1.

**37—Entry of Motion.**

A motion for Judgment absolute as in case of a non-suit for not proceeding to trial pursuant to a peremptory undertaking should not be entered on the Motion paper, and if entered, the cost occasioned thereby will not be allowed. *O'Regan v. Robinson*, 3 *Kerr* 224.

**38—Demurrer books not delivered—Non compliance with rules of court—Application to restore case to special paper after judgment delivered—Refusal.**

Where judgment had been given for the plaintiff on demurrer for failure of the defendant to deliver demurrer books as required by the rules of Court, the majority of the Court (Fisher J. diss) refused to allow the cause to be re-entered on the special paper for argument on demurrer, although the defendant's Counsel made affidavit that he thought the books had been forwarded to his agent for delivery; that matters that could not well be neglected had kept him from attending court during the term in which judgment was given; that he had obtained the consent of the plaintiff's Attorney to the cause standing over; and that the plaintiff's Attorney was willing to allow the cause to be re-entered if the court would permit. *Anderson v. Fawcett*, 2 *P. & B.* 374.

**39 Verdict—Motion to increase, where previous judgment given in case—Party dissatisfied should appeal.**

Where the Court had previously given judgment in the

case, they refused motion to increase the verdict, stating that if the party moving was advised that the judgment was erroneous he should appeal. *Bangor Ins. Co. v. McLeod*, 2 P. & B. 336.

**40—Rule against Sheriff—Entry on motion paper.**

A rule for a Sheriff to pay over money in his hands, cannot be entered on the motion paper and moved on fourteen days notice. *Ex parte Graham*, 6 All. 209.

**Motions to Amend.**

*See Amendment.*

**Motions to set aside Assessment.**

*See Judgment by default.*

**41—Motion for Judgment as in case of non-suit—Fourteen days notice must be given.**

The Court refused to hear an application for a rule *nisi* for judgment as in case of a non-suit, without the fourteen days notice of motion being previously given and cause entered on the motion paper. *James v. McLeod*, 2 P. & B. 800.

**Motions for judgment as in case of non suit—To enlarge peremptory undertakings.**

*See Judgment as in Case of Non-suit.*

**Time within which motion to set aside award under submission.**

*See Arbitration IV. 13, 14, 15.*

**Non-suit at party's request.**

*See Non-suit.*

**42—**Attachment under 87 Vic. cap. 7, (Consol. Stat. cap. 42.) Motion to set same aside must be made before appearance. *Robin v. Taylor* 1 P. & B. 208.

**The Court is unwilling to decide questions of importance upon summary application.**

*See Bankrupt 5.*

VI.

STAYING AND SETTING ASIDE PROCEEDINGS, WHEN GRANTED OR REFUSED.

**1—Release.**

The Court will not set aside a release given by a sur-



viving plaintiff, on the ground of fraud on the releasor, because that question may be tried between the parties. *Reed v Wilson*, 1 Kerr 365.

2—Where a release is pleaded *puis darrein continuance*, the plaintiff cannot apply at the same time to set aside both the plea and the release—the first as being too late, and the latter as being fraudulent. *McLellan v. Cogle*, 4 All. 237.

**Execution—No return of, first issued.**

*See* Execution III. 2.

**3—Execution—Not warranted by judgment.**

An execution requiring the Sheriff to take the defendant, to satisfy the sum of £150, which the plaintiff had recovered against him for his *debt*, which he had sustained as well on the occasion of the non-performance of certain promises and undertakings lately made by the defendant to the plaintiff, as for his costs and charges, etc., is not warranted by a judgment in debt on a bond and warrant of attorney, and will be set aside. *Willard v. Lodge*, 2 All. 160.

**4—Bond and warrant of attorney—Absence of attorney.**

It is no ground for setting aside a bond and warrant of attorney, that they were executed by the defendant, without the presence of an attorney, in pursuance of a promise and arrangement made while he was under arrest, he having been actually discharged from the arrest before executing them, and not being in the gaol or other place of confinement. *Scollar v Grass*, 1 Kerr 527.

**5—Judgment—Fraud.**

The plaintiff and defendant referred certain disputes to arbitration, and signed mutual promissory notes for £20, on the same piece of paper, with a condition underwritten that if the award was performed the notes should be void: an award was made in favor of the plaintiff for £1 9s., which the defendant refused to pay, whereupon the plaintiff tore off the lower part of the paper containing his note

to the defendant, and the condition, and brought an action against the defendant on the note, in which judgment was signed for the whole amount of the note. The Court set the judgment aside for fraud. *McLoon v. Lowell*, C. Ms. 67.

**6—Judgment—Arrest of.**

It is not a good ground for arrest of judgment that the declaration is entitled generally of a term, and the cause of action appears to have accrued on a subsequent day in the term. *Williston v Pierce*, 2 All. 162.

**7—Insolvent debtor—Order.**

If an order of discharge is irregularly obtained it should be set aside before any proceedings are taken against the debtor. *Doe v Holmes*, 4 All. 557.

**8—Non-pros—Delay in application to set aside.**

A judgment of *non pros*, irregularly signed, will not be set aside on summary motion, where there is an unreasonable delay in coming to the Court for that purpose. If the judgment in such case be erroneous, the plaintiff must resort to his writ of error *coram nobis*. *Ledden v. Rogers*, 2 Kerr 326.

9—The Court refused to set aside a judgment of *non pros*, upon a summary application, for irregularity, where ten months had expired before any application for that purpose was made, and the plaintiff's attorney had shortly after the judgment been served with a copy of the bill of costs, and an execution for the costs had been executed some time before the last Trinity Term, the delay not being satisfactorily accounted for. *Lonchester v. Murray*, 2 Kerr 334.

**10—Two writs for the same cause of action.**

Two writs for the same cause of Action were simultaneously issued to different counties, and the defendant arrested on both, and bail entered. The plaintiff's attorney immediately notified the defendant's attorney that there was but one cause of action, and that he intended to discontinue on the second writ: only one declaration was

filed. *Held*, That the defendant could not sign judgment of *non pros* in the other suit. *Johnston v. Bransfield*, *Ber.* 73.

**11**——The Bail piece must be on file before judgment of *non pros* can be signed in a bailable action, pursuant to rule of Hilary Term, 2 Wm. IV. *Wiggins v. Dibblee*, *Trin. T.* 1872.

**12**——Judgment of *non pros* can not be signed until the defendant has filed an appearance; notice of appearance is not sufficient. *Cushing v. Gordon*, *Mich. T.* 1872.

**13—Inquisition—Giving verdict for defendant.**

On the execution of writ of inquiry the jury gave a verdict for defendant: the Court set aside the inquisition. *Doe v. Dobson*, 2 *All.* 456.

**14—Delay.**

Where the Defendant had in Hilary Term obtained a rule for assessing damages before a jury of inquiry, but had neglected to serve the same on the plaintiff until the 14th March; and in the meantime the plaintiff had, in ignorance of such rule, assessed his damages before a Judge on the 2nd March, and proceeded to enter up final judgment thereon in due course on the 29th March; and no application was made to a Judge to stay proceedings until the fifth June: the Court refused to interfere. *Harding v. Leldden*, 2 *Kerr* 173.

**15—Interlocutory judgment—No personal service—Lunatic.**

Where a suit had been commenced and judgment by default signed against a person of unsound mind while he was confined in a lunatic asylum, and the writ had not been served personally on him, and no notice of executing the writ of inquiry given; the Court set aside the interlocutory judgment and subsequent proceedings. *Sandall v. Godsoe*, 1 *All.* 441.

**16**——Where a writ was not served personally, and no Judge's order was obtained to perfect the service according to the Act 7 Wm. IV, cap. 14, sec. 1, and the defendant denied any knowledge of the suit, a judgment and

execution were set aside for irregularity, though the defendant's affidavit of ignorance of the suit was contradicted by his admission since his arrest. *James v. Dupres*, 1 *All.* 506.

**17**———Interlocutory judgment signed for want of a plea, set aside on affidavit of merits and payment of costs ; though a demand of plea had been sent to a student in the office of the defendant's attorney, and was admitted to have been received in his office before the judgment was signed. *Estey v. Newcomb*, *Ber.* 343.

**Ejectment—Setting aside judgment by default.**

*See* Ejectment IV. 4.

**18—Corporation—Summons—Declaration—Variance.**

Where a summons issued against a corporation under the Act 12 Vic. cap. 39, sec. 16, described the cause of action to be "debt," and the declaration was in covenant, an interlocutory judgment signed thereon was set aside for irregularity. *Gilmore v. The Liverpool and London Assurance Co.*, *Hil. T.* 1871.

**Setting aside after execution of writ of inquiry.**

*See* Judgment by Default.

**Other causes.**

*See do.*

**19—Verdict—Notice of trial not given—Counsel.**

Where no notice of trial was given by plaintiff, and a counsel who had been retained for defendant in a former trial in ignorance of this fact appeared without authority, defendant being absent, and defended, a verdict for the plaintiff was set aside. *Doherty v. DesBrisay*, 1 *Han.* 494.

**20—Inquiry—Damages—Assessment.**

Where on a writ of inquiry before a Sheriff's jury to assess damages for detention of liquor from September 1867 till May following, the plaintiff gave evidence of transactions relative to the liquor prior to September, and the expense of warehousing and insurance on the liquor, and legal expenses, and no rule was laid down by the

Sheriff for the guidance of the jury as to the measure of damages, the Court set aside the assessment, being unable to ascertain by the evidence how the jury had arrived at the amount. *Kinnear v. Robinson*, 2 *Han.* 73.

**21**———It is no ground for setting aside the assessment on a writ of inquiry of damages under the Statutes 8 and 9 Wm. III. cap. 11, executed at the assizes, that the Sheriff had not returned any panel on the writ, and the damages have been assessed by the jury summoned to try the issues at the assizes. *Wheeler v. Gove*, 1 *Kerr* 580.

**22**———On judgment by default against three defendants jointly, the attendance of one of them at the execution of the writ of inquiry is not a waiver of an irregularity in the previous proceeding against a defendant who did not attend; and the damages being joint, the inquisition was set aside. *Mcdonald v. Upton*, 3 *Kerr* 565.

**23—Bail—Proceedings against.**

Proceedings against bail were set aside on payment of costs, where notice of trial had been given for the Sittings after Trinity Term 1858, but the cause was not tried in consequence of the defendant's agreement to give a confession, and the confession, though dated 1st June, 1858, was not given till October, 1859, when judgment was signed. *Raymond v. McMackin*, 4 *All.* 524.

**24**———After proceedings taken against the two bail upon a recognizance, to which they have jointly pleaded three several pleas, the Court refused to sustain a summary motion made on behalf of one of the bail for relief on grounds inconsistent with two of the pleas, and involving the same point put in issue by the third. *O'Connor v. Mott*, 2 *Kerr* 509.

**25**———When upon a summary writ returnable in Hilary Term 1842, special bail was regularly put in and notice given, but the cause was not entered by the plaintiff in that or the next succeeding term; but an entry was irregularly made in Michaelmas 1842, and final judgment signed in the April following—the Court stayed proceedings subsequently taken on the recognizance of bail, and ordered an exonere-

tur to be entered on the bail piece, without costs. *Muldoon v. Beveridge*, 2 Kerr 532.

**26**——Exoneretur ordered to be entered on bail last given where defendant arrested in two suits in two counties for same cause of action. *Johnston v. Bransfield*, Ber. 78.

**Affidavit not filed in time—Entry docket.**

See Bail 8.

**27—Judgment.**

A judgment after verdict signed before the expiration of the four day rule is irregular. See *Infra* VII. 14.

**28**——It is not sufficient to set aside a judgment for irregularity, that the defendant was not personally served with process, it appearing that the service was accepted by a person who while in the defendant's employ, had authority to accept service of process for him, though at the time of accepting service, he had left the defendant's employ, the defendant not having expressly denied his authority, and not having taken steps to set aside the proceedings promptly, after knowledge of the irregularity. *Farley v. Philips*, Ber. 347.

**29—Judgment—Demurrer books—Merits.**

Where the defendant's attorney had by mistake delivered demurrer books to the senior Judges, in consequence of which the plaintiff got judgment without argument, under the rule of Mich. T. 9 Vic; the Court refused to set aside the judgment without an affidavit of merits, it appearing that there was an issue in fact to be tried, in which substantially the same question was involved as that raised by the demurrer. *Collins v. McDonnell*, 2 All. 158.

**30—Settlement of cause—Trial after.**

Where after notice of trial the plaintiff and defendant settled the suit, but the plaintiff neglected to inform his attorney who carried the cause down to trial, and obtained a verdict as in an undefended suit, the Court set aside the judgment with costs. *Mytton v. Parlee*. East. T. 1864.

**31—Service—No Judge's order—Defendant's knowledge.**

Although it is an irregularity to proceed in a suit where

the service of process is not personal, without having obtained a Judge's order to perfect the service, yet where the defendant was aware that the suit was going on, and after final judgment, gave security for the amount, payable at a future day; the Court refused to set aside the judgment. *O'Regan v. Berrymount*, 1 Kerr 167.

**32**—Where process has come to the defendant's knowledge, the Court refused to set aside a judgment for irregularity, though there was no Judge's order to perfect the service of the writ. *O'Leary v. Graham*, 5 All. 105.

**33—Judgment and execution.**

Plaintiff and defendant referred certain disputes to arbitration, and signed mutual promissory notes for £20, written on the same paper, with a condition underwritten, that if the award was performed the notes should be void; an award was made in favour of the plaintiff for £1 9s. Od., which the defendant refused to pay; whereupon the plaintiff tore off the lower part of the paper, containing his note in favour of the defendant and the condition, and brought an action against the defendant on the note, and signed judgment by default, and issued execution for the whole amount of the note and costs. After the action was brought, the defendant had offered to pay the amount of the award and the costs of the suit on the note. The Court set aside the judgment and execution with costs. *McLoon v. Lowell*, C. Ms. 1827.

**34—Information—Judgment.**

Judgment was arrested on an information where the offence was not sufficiently alleged. *Attorney-General v. 250 barrels of Fish*, Ber. 419.

**35—Execution upon judgment—Trial by proviso.**

An action of trespass *qu. cl. jr.* was instituted in the name of W. by persons to whom W. had agreed to sell the land. W. did not appear to have expressly authorized the action, but he had received the purchase money, although he had not executed a conveyance, and had delivered the title deeds of the land to the attorney of the vendees, who was also the plaintiff's attorney on the record, before the

commencement of the action. The cause had been twice taken down to trial by the plaintiff's attorney, but remained untried, when at a third assizes the defendant gave notice of trial by proviso, and the plaintiff not appearing when the cause was called on was non-suited, and the defendant had since taxed his costs and signed judgment. The plaintiff had seen this bill of costs, and promised it should be paid. Under these circumstances the Court refused to set aside and execution and levy made thereon on W. for the costs. *Wetmore v. Reed*, 2 Kerr 480.

L. and G. appeared as attorneys of the defendant on the record; the notice of trial by proviso had been by L. alone. *Held*, That the plaintiff was too late to take advantage of the irregularity, if such, after the taxation of costs, of which due notice had been given, and judgment had been signed. *Ibid*.

### **36—Nominal plaintiff—Action,**

Where application was made by the defendant to set aside proceedings because the action was brought in the name of the plaintiff for the benefit of a third person, without the plaintiff's authority. The Court refused to interfere without an affidavit of the nominal plaintiff. *Glen-cross v. Wark*, 6 All. 201.

### **37—Judgment of non-suit—Replevin.**

A judgment of non-suit in replevin inadvertently given was set aside, notwithstanding the omission of plaintiff's counsel to take the objection on motion. *McGeehan v. Hall*, 3 All. 507.

### **38—Capias—Debt instead of trespass.**

The proceedings in a cause will not be set aside for irregularity because the *capias ad respondendum* was to answer the plaintiff in a plea of debt instead of trespass. *Campbell v. Mossop*, C. Ms. 154.

### **39—Second action.**

Proceedings will be stayed until costs of prior action paid, where conduct negligent or vexatious. *See* Second Action.



**40—Puis darrein continuance—Release.**

Where a new trial has been granted in order that the jury might find whether actual payments had been made, agreeably to certain receipts produced in evidence on a former trial between the parties; if the defendant defeat that object by pleading a release *puis darrein continuance*, the Court will set aside the plea with costs; but has no authority to order the release to be given up to be cancelled. *Goss v. Messinett*, 1 All. 104.

**40 a**———A plea *puis darreiu continuance* regularly pleaded and verified by affidavit, cannot be set aside as false. If the facts stated in the plea are denied, the plaintiff should take issue on it. *Gilbert v. Graham*, 1 Pug. 202.

**41**———Bill of Exceptions—Setting aside before return to writ of error. See Bill of Exceptions.

**42—Precipe.**

*Quære*, Whether proceedings will be set aside for want of a precipe—Entering an appearance is a waiver of the objection. *Kirlin v. Baillie*, 2 All. 115.

**43—Second Ejectment—Refusal to enter into consent rule.**

Where a second ejectment was brought in consequence of the tenant's refusal to enter into a consent rule containing a proper description of the premises, the Court refused to stay the proceedings until the costs of the first suit were paid. *Doe d. Morrice v. Roe*, 3 All. 84.

**44—Several actions—Same cause.**

Four actions of trespass for taking goods were brought by the same plaintiff against several defendants, one of which was tried and a rule *nisi* granted to set aside the verdict, the Court refused to stay the proceedings in the other three actions until the determination of the first suit, though it was sworn that the defences were the same in all the cases, and the defendants believed that they were all brought for taking the same goods. *Lawton v. Gray*, 3 All. 576.

**45—Trying cause as undefended—No Plea.**

It is irregular to try a cause without a formal plea on

which issue can be joined ; therefore where a cause was tried as undefended, the Court set aside the verdict on application of the defendant (an attorney) stating that he had not given any plea, and did not consider the cause at issue, for want of particulars which he had demanded, though he had written to the plaintiff's attorney that the plea would be the general issue,—it being doubtful whether he had received notice of trial. *Cameron v. Connell*, 3 All. 398.

**Writ—Misnomer—Affidavit.**

See affidavit III. 5.

**Levy—Setting aside.**

See Execution I. 7.

**46—Procedendo.**

A writ of *procedendo* was issued after a *habeas corpus* to remove the cause was filed, as also common bail, but it appeared that there had been a previous irregularity in the writ of *habeas corpus* by which the cause had been removed, and the writ afterwards was amended by the defendant's attorney, who availed himself of the writ so improperly amended to defeat the plaintiff's right of action, by refusing to receive a declaration ; both parties having been guilty of irregularity, the Court set aside the writ of *procedendo* on the condition that the defendant should receive a declaration in the course of the term of which it had been offered to the defendant's attorney. *Wilson v. Atkinson*, 3 Kerr 343.

**47—Suspending proceedings—Amendment.**

Pending a writ of error, the Supreme Court may in its discretion allow an application to be made to the Court below to amend formal errors on the record, and may suspend judgment in the mean time. Such proceeding allowed where the award of the *venire* and the day of trial were left blank on the record of the Court below. *Kinnear v. Gallagher*, 1 Kerr 424.

**48—Relief from judgment—Infant—Scire facias.**

Where a judgment by default was entered against two defendants, B. and C. (B. alone being served with process)

in 1884, upon a joint and several promissory note, purporting to be signed by B., for himself and also for C., and a *scire facias* was now issued whereon to found an execution against C. *Held*, upon a motion supported by affidavits stating that C. at the date of the note was an infant, did not authorize B. to sign the note for him, and that the note was made wholly without his consent or knowledge, That C. was entitled to be relieved against the judgment; and that neither the fact of the note having been given for a balance due the plaintiff on lumbering transactions in which B. and C. were jointly concerned, nor the fact of C.'s having offered to compromise since coming of age by paying a third of the debt, was sufficient to deprive him of his right to relief. *Mitchell v. Astle*, 2 Kerr 86.

#### 48 a—Judgment—Non-filing of papers—Estoppel.

After judgment in a case which had been defended, a motion was made to set aside the judgment *fi. fa.* levy, and all other proceedings, on the grounds that there were no papers or documents on the plaintiff's side of the cause on the files of the Court except the judgment roll, which omission had only very lately come to defendant's knowledge; that he had a good defence on the merits, and that the *fi. fa.* differed in amount from the judgment—whereupon a cross application was made to amend the *fi. fa.* that it might correspond with the judgment. *Held*, That the defendant was estopped, by his proceedings in the action, from taking advantage of the not filing of the plaintiff's papers, etc., and that the latter might amend the *fi. fa.* on payment of costs. *Held*, also That the plaintiff's attorney, by his neglect, had forfeited his costs of suit. *Lynott v. Seelye*, 1 All. 35.

#### 49—Non-resident—Judge's order—Necessity of obtaining order.

A writ, issued for service beyond the limits of the Province, under the Act 18 Vic. cap. 25, was served on the defendant in Ireland on the 19th September 1870, requiring him to appear within sixty days. On the 17th November following, the plaintiff filed an entry docket in the cause;

and on the 12th December obtained a Judge's order authorising him to enter the cause as of Michaelmas Term then last, to enter a rule to plead on filing a declaration, and, in case the defendant did not plead by the first day of Hilary Term, the plaintiff to be at liberty to sign interlocutory judgment, and to proceed according to the ordinary practice, the declaration was filed on the 19th December; interlocutory judgment by default was signed on the 8th February 1871; and final judgment on the 19th May. *Held*, (Fisher and Wetmore, J. J., *dubitantibus*) That the plaintiff had no right to proceed in the cause after service of the writ without a Judge's order; that the order of 12th December did not relate back to the previous entry of the cause; and that the cause not having been entered in pursuance of the Judge's order, the interlocutory judgment was a nullity. *Mitchell v. Lawther*, 1 Pug. 79.

**50—Necessity of legal proof.**

In assessing damages under the Act after judgment by default, the plaintiff must establish the amount of his debt or damages by legal proof. Where the only evidence of the debt was an account shewing several sums of money due from the defendant to the plaintiff on various transactions, with an affidavit of the plaintiff that the "account was just and true,"—it was held insufficient, and the judgment was set aside. *Ibid*.

**51—Separate action—Payment of debt and costs—Judgment roll.**

Separate actions having been brought against three joint and several makers of a promissory note, the defendants offered to pay the debt and costs to the plaintiff's attorney, but, there being a dispute about the amount of costs, a Judge's summons was obtained for the plaintiff's attorney to shew cause why the proceedings should not be stayed on payment of the debt and costs. The summons was served on the plaintiff's attorney at Richibucto on the 12th December; the damages were assessed and judgment signed on the following day; the agent of the plaintiff's attorney having no notice of the summons. The

Court set aside the judgment, and ordered the proceedings in the three suits to be stayed, on payment of the debt and costs up to the 12th December,—not being satisfied that the judgment rolls had been made up until after the defendant had offered to the plaintiff's attorney to pay the amounts due. *McInerney v. Chandler*, 5 *All.* 486.

In ordinary cases, the plaintiff's attorney is not justified in making up the judgment roll, in order to charge the defendant with the costs of it, till the damages are assessed. *Ibid.*

**52—New trial ordered unless party consent to reduce verdict—Party fixing damages himself—Postea—Defendant's right to verdict for nominal damages.**

In replevin for a quantity of deals the Court ordered a new trial unless defendant consented to reduce verdict to the value of eighteen pieces. Defendant elected to reduce, but gave no notice to plaintiff's attorney, and afterwards obtained postea from the clerk of the circuits instructing him to enter as damages an amount proportioned as damages found by the jury in his favour for 314 pieces. A motion being made to set aside postea and stay proceedings. *Held.* 1. That when a postea has been stayed by a Judge's order, the clerk of the circuits should not deliver it out to either party without a rule of Court or Judge's order. 2. That the defendant had no right to fix the damages himself, but should have applied to the Court to ascertain amount. 3. That he was entitled to have verdict entered in his favour for nominal damages. *Steeves v. Wilson*, 2 *Pug.* 492.

**Discontinuance—Side bar rule obtained by plaintiff—Setting same aside.**

*See* Discontinuance. *Harris v. Marter.*

**53—Replevin—Sheriff interested—Setting aside writ.**

Plaintiff as assignee of the estate of H., an Insolvent; brought replevin, the writ being directed to and served by the sheriff who was also an inspector of the estate. *Held,* That the sheriff as inspector was interested in the suit and the writ of replevin was set aside. *Fairweather Ass. &c. v. Nevers*, 2 *Pug.* 524.

**54—Inquisition—Cross examination—Refusal to allow.**

Where in an enquiry before a sheriff under a writ *de prop prob* the defendant's counsel was allowed to put a paper in evidence, without the plaintiff's counsel being previously permitted to cross examine upon it, the inquisition was set aside. *Hanington v. Cormier*, 2 *Pug.* 450.

**55—Staying proceedings till costs of former action for same cause paid—When motion will not be granted.**

Where judgment *quasi* nonsuit was signed against plaintiffs for not proceeding to trial pursuant to notice, and he afterwards brought a second action for the same cause, it appearing that the plaintiff's conduct was not vexatious or negligent, but that he was prevented from proceeding to trial under circumstances which would, if shewn to the Court, have been sufficient to have prevented the granting of the motion for nonsuit, the Court refused an application to stay proceedings in the second action until payment of the costs of the former suit. *Wetmore v. Baxter*, 3 *Pug.* 285.

**56—Setting aside service of summons—Application by wife of defendant—Delay.**

Judgment was signed against the defendant, in August, 1876, and execution issued, under which his property was levied on and advertised for sale on the 10th February, 1877. In Hilary Term, 1877, application was made by the defendant's wife to set aside the judgment, and execution, and all previous proceedings, on the ground that there had been no service of the process, the defendant being out of the Province at the time, and, never having returned or had any notice of the suit. *Held*, That if the application could be made by the wife, it must be made within a reasonable time after she had knowledge of the proceedings, and that this application was too late. *Quære*, Whether a married woman can apply to set aside proceedings in a suit against her husband, without showing that the application is made by his authority? *Burchell v. Poor*, 1 *P. & B.* 151.

**57—Delay in applying to set aside bail bond—Waiver—Judge's order.**

Defendant was arrested and gave bail on November 14th, 1875, in an action in the County Court, and an attaching order was issued at the same time, under the Act 38 Vic. cap. 5. Plaintiff neglected to file the affidavit to hold to bail, but defendant made no application to set aside bail bond until the 3rd June following. On April 15th, he obtained a summons calling on plaintiff to shew cause why the Attaching Order should not be set aside, on the ground that such order could not issue in a suit commenced by *capias*, and where defendant had been arrested; and while that question was pending before the Judge, he applied to set aside the bail bond. The County Court Judge refused the application. *Held*, on appeal, that the Judge was right, as the application to set aside the Attaching Order was a waiver of any objection to the bail bond, even if it was not waived by the previous delay. *Held* also, That in a matter of this kind, where it did not appear that the appellant had suffered any wrong by the affidavit not being on file, and the Judge had ordered it to be filed, the Court should not be disposed to interfere with his order. *Lewis v. Weldon*, 2 P. & B. 145.

**I eplevin** will not stay proceedings in action upon, unless under very special circumstances.

*See* Bond 6. *Betts v. McGowan*.

**58—Mismomer—Initials—Writ.**

Where plaintiff is described in a writ by the initial letter of his Christian name, the defendant's proper remedy is to apply to a Judge to compel him to amend, and the writ will not be set aside for irregularity on this ground. *McMonagle v. Grant*, 3 Pug. 281.

*Semble*, That a consonant may be the Christian name of a party. *Ibid*.

**59**—A party may be sued under a name he is commonly known by though it is not his proper name. *Davidson, v. Ring*, 2 Pug. 5.

**60—Nisi Prius order.**

Before an order at *nisi prius* can be set aside it must be made a rule of Court. *Smith v. Gerow*, 2 *Pug.* 425.

**61—Amending demise in declaration.**

An application to amend the term of the demise stated in a declaration in ejectment so as to enable the lessor to issue execution, refused, after the lapse of 15 years and after the death of the tenant. *Doe dem Fauls v. Fen*, 6 *All.* 328.

**Defence when bona fide—Plea will not be set aside as frivolous, &c.**

See Pleading II. 47. *Milner v. McKenzie*.

**Grounds of defence should be pleaded.**

See Replevin 49. *Davidson v. Ring*.

**Arrest—Setting aside.**

See Affidavit VI. 15.

**Affidavit—Delay in moving to set aside arrest for defect in.**

See Affidavit VI. 15, *McIntosh v. Burnett*.

**Trial of causes—Judge's power to make—Cause tried out of order.**

See Judge's Order.

**Filing affidavit—Delay—Discharge of defendant.**

See Bail 11. *Palmer v. Dinsmore*.

**Notice of Action—Motion to set proceedings aside—Attorney giving notice not having taken out certificate—Notice not a proceeding in Court, motion refused.**

See Action at Law—Notice. *Wetmore v. Harding*.

**Judgment signed—Breach of agreement concerning suit.**

See Attorney, V. 7.

**Service of writ in replevin Sheriff interested as Inspector of estate.**

See Sheriff 31.

**Crown servant—Action of trespass.**

Affidavit of alleged trespass committed by defendant as



employee of Government. Summary application to stay proceedings refused. Defendant ought to resist action by plea in ordinary way.

*See* Action at Law IX. 80. *Milner v. Brydges*.

## VII.

### IRREGULARITY.

#### 1—Special jury—Striking—Trial by common jury.

The plaintiff obtained a rule for a special jury, which was struck, and reduced to twenty-four by the defendant at the request of the plaintiff's attorney. The plaintiff's attorney then took the list to examine it, and kept it without making any objection, but afterwards, without notice of his intention to abandon the special jury, tried the cause by the common jury as undefended, the defendant refusing to appear. *Held*, That the trial was irregular. *Bradbury v. Baillie*, 1 All. 427.

*Quere*, Whether a party, after obtaining a rule for a special jury, has a right to abandon it? *Ibid*.

#### 2—Service of rule nisi.

Irregularity waived by entering cause on special paper and appearing by counsel. *Barlow v. O'Donnell*, 1 All. 483.

3—Taxation of costs on Good Friday not irregular. *Gilmore v. Gilbert*, 2 All. 50.

#### 3 a—Affidavit to hold to bail—Filing—Time—Waiver.

It is in general sufficient that affidavits to hold to bail be filed within thirty days after the term in which the writ is returnable, and as the defendant cannot object to the want of the affidavit being on file until he has entered special bail, such entry is not a waiver of the omission to file the affidavit, but pleading to the action after a term has intervened is a waiver as the defendant might have searched the office and informed himself of the irregularity. If a defendant being aware that the plaintiff has not filed the entry docket or declaration in a cause, appears at the trial and defends the action, he thereby waives the previous irregularity in the plaintiff's proceedings. *Read v. McLellan*, 1 All. 8.

**4—Affidavit to hold to bail.**

Irregularity waived by pleading to the action. *McPhelim v. Larson*, 1 *All.* 71.

**5—Bail.**

*Quere*, Whether an application for relief under 1 Rev. Stat. cap. 124, estops bail from applying to defend on the merits? *Rippey v. Austin*, 4 *All.* 77.

**Distress—Breaking Door.**

*See* Distress.

**6—Warrant of attorney—Absence of attorney.**

Where a defendant is substantially in custody at the suit of plaintiff, a bond and warrant of attorney executed to the plaintiff in the absence of an attorney, are irregular. The defendant was within the gaol, and had not actually been discharged therefrom, although he was told he might leave it. *Ledden v. Hanson*, 1 *Kerr* 90.

**7—Venditioni Exponas.**

Irregularity in issuing will not affect a purchaser under Sheriff's deed. *See Doe d. Hazen v. Hazen*, 3 *All.* 87.

**8—Joint debtors—Service—Venire.**

In an action against joint debtors, where all are served with process, and the plaintiff proceeds under the Act 26 Geo. III, cap. 24, it is irregular in making up the record to allege that the defendants not served *say nothing in bar etc.*, as in a judgment by default; nor should the award of the venire be to *assess damages* against such defendants, as well as to try the issue joined between the plaintiff and a defendant who has pleaded. *McLaughlin v. Ratchford*, 3 *Kerr* 421.

**9—Entry of Cause—Bail.**

*See* Supra VI. 25.

**10—Interlocutory judgment—Signing.**

An interlocutory judgment signed by the plaintiff, after demand of plea, where the defendant had filed the general issue but neglected to give a copy of it to the plaintiff's attorney, was held to be irregular. *Lockwood v. Brown*, 2 *Kerr* 82.

**11**———The plaintiff having demurred to the defendant's plea, delivered a copy of his demurrer to the defendant's attorney, received from him a joinder in demurrer with objections, and gave him notice of setting down the case for argument, whereupon the demurrer book of the defendant was made up and delivered; but the plaintiff, discovering that the defendant's papers in the cause were not on file, signed interlocutory judgment; subsequent to which the attorney of the defendant who had been in default for non-payment of Court fees, purged his contempt by paying up the fees, and procured a Judge's order to the clerk to receive his papers. On motion to set aside the interlocutory judgment for irregularity, so signed after the several steps taken—*Held*, That the signing of the interlocutory judgment was regular, the contempt of the attorney being no excuse for the wrong. *Held* also, per Street, J., That the subsequent steps did not amount to a waiver of the irregularity, the plaintiff having been in the dark as to the circumstances afterwards discovered. *Partelow v. Smith*, 3 *Kerr* 349.

**12—Judgment by default—Common bail.**

A judgment by default, signed by the plaintiff before common bail is filed, or appearance entered for the defendant, is irregular, and such irregularity will not be considered waived by the mere delivery of a notice of appearance by an attorney for the defendant, if the plaintiff's attorney, after receiving such notice, has neglected to deliver a copy of declaration according to the practice of the Court. *Johnston v. Cornwall*, 1 *Kerr* 197.

**13—Judgment—Signing—Time.**

It is no ground for setting aside a judgment, entered up on a verdict recovered at the assizes, for irregularity, that it was signed on the same day that the rule for judgment is actually entered; more than four days having elapsed since the commencement of the term. This rule is considered as entered on the first day of the term, though not actually done until afterwards. *Frink v. Platt*, 1 *Kerr* 656.

**14**———A judgment having been signed on 16th October, the rule *nisi* being entered on 18th, was set aside as irregular, the four days' rule not having expired. *Hatton v. Flaherty*, *Ber.* 129.

**15—Demand of plea.**

The rules of Easter Term 25 Geo. III, require, in all cases, a declaration to be filed; therefore, if the plaintiff demands a plea twenty days after delivery of a copy of declaration to the defendant's attorney, but before twenty days after filing the declaration have expired, such demand is irregular. *Passmore v. Turner*, *C. Ms.* 108.

**16—Recognizance roll—Bail piece.**

It is irregular to make up and file a recognizance roll until the special bail piece be on file to warrant it. *O'Connor v. Mott*, 2 *Kerr* 509.

**17—Filing plea—Irregularity—Waiver—Knowledge of irregularity.**

A plea should be filed as well as served, and the Common Law Procedure Act (Consol. Stat. cap. 87) does not alter the practice in that respect.

The failure to file a plea where it has been served on the plaintiff's attorney is an irregularity and not a nullity, and may be waived.

The test of the defendant's knowledge of an irregularity is not when he knows of it, but when he has first the means of knowing of it. *Dever v. Wiley*. 1 *P. & B.* 507.

**Ejectment for non payment of rent—Rule nisi.**

Misapprehension on part of lessor of plaintiff as to nature of rule obtained on his own application—Judgment irregularly signed.

*See Ejectment IV. 7. Doe et Stephens v. True.*

**Bailable writ—No cause of action stated in ac etiam clause an irregularity.**

*See Supra IV. 1.*

**Affidavits used in moving for rule nisi for mandamus are irregular, if intitled in a cause.**

*See Mandamus. See Affidavit II. 3.*

**Execution—Part levy—Return—Non-recital.**

*See Execution III. 2.*

**Service of process.**

*See Supra IV.*

**No personal service, nor Judge's order.**

*See Supra VI. 31, 32.*

**Attorney's name on record.**

Irregular for more than one attorney's name to appear on record. *See Gilmore v. Bull*, 1 Kerr 94.

**Trying cause without formal plea on which issue can be joined, is irregular.**

*See Supra VI. 45.*

**Setting aside proceedings for irregularity.**

*See Supra VI.*

## VIII.

## RULES.

**1—Casual ejector.**

A rule *nisi* for judgment against the casual ejector need not state the name of the tenant, nor the number of days allowed him to appear. *Doe d. Taylor v. Roe*, 1 All. 1.

**2—Claiming to defend as landlord.**

If the relation of landlord and tenant does not clearly exist, there should be a summons or a rule *nisi*, before a person claiming as landlord can be allowed to defend an action of ejectment in that character. *Doe d. Fauls v. Fen*, 1 All. 585, 633.

**3** ———Rule for judgment considered as entered on the first day of term, though not actually done until afterwards. *Frink v. Platt*, 1 Kerr 656.

**4—Order of Nisi Prius.**

There must be a motion in Court to make an order of *nisi prius* a rule of Court. *Underwood v. McHenry*, 2 All. 94.

**5—Rule for body.**

A rule for sheriff to bring in the body of the defendant may be taken out in term without motion in Court. *Porter v. Burns*, 1 All. 106.

*Quære*, If the usual rule for body be entered in the

docket agreeably to the practice, it may not be taken out in vacation. *Ibid.*

**6—Costs—Moving rule with costs.**

A rule dischargeable without costs, if moved with costs will be discharged with costs. *Porter v. Burns*, 1 *All.* 106.

**7** ——— If a rule for setting aside proceedings with costs is discharged on shewing cause, the costs of opposing it do not follow as of course. The successful party should apply for costs at the time of discharging the rule. *Kelly v. Wilson*, 1 *All.* 199.

**8** ——— Where a rule *nisi* for a *certiorari* to remove a conviction is discharged, the successful party is not entitled to the costs of opposing the rule. *Ex parte Daley*, 1 *All.* 435.

**9** ——— Where a new trial has been granted on payment of costs, and they have been taxed and demanded of the attorney who obtained the rule who was informed that unless they were paid an application would be made to discharge the rule. The Court granted a rule for that purpose absolute, unless the costs were paid in ten days after service. *Scribner v. McLaughlin*, 1 *All.* 440.

*See Further—Costs.*

**10—Costs—Attachment—Requisites.**

Refusal to pay costs taxed upon an agreement for consent rule—the rule must be drawn up before motion for attachment. *Doe v. King*, 3 *Kerr* 178.

**11** ——— To enable party to obtain rule for attachment for non-payment of costs, the costs should be taxed after consent rule is taken out. *Doe v. King* 3 *Kerr* 296.

**12** ——— Rule for attachment for non-performance of award, the award must be before the Court. *Marks v. Marks*, 3 *Kerr* 486.

**13—Demanding costs.**

Copy of power of attorney should be served on party when costs demanded. *Doe v. King* 3 *Kerr* 492.

**14** ——— Affidavit of demand of money must state the day of demand. *Campbell v. Todd*, 3 *Kerr* 199.

**15—Attachment—Witness.**

Clear case of contempt must be shewn. Not necessary to shew that witness was called on subpoena if it appears that he did not attend—the materiality of his testimony not taken into consideration. *Maloney v. Morrisson*, 1 *All.* 240.

**16—Mandamus—Rule discharged—Costs not allowed—Affidavits being improperly entitled.**

See Affidavit II. 3.

**Rule for certiorari.**

See Certiorari.

**17—**Rule *nisi* for new trial granted, and on argument, Court equally divided in opinion, judgment follows on the verdict. *Gaudin v. McKilligan*, 2 *Kerr* 477.

**18—Refusal to amend rule.**

Where a rule has been obtained in a former term for setting aside a judgment for irregularity with costs, the Court refused to amend the rule by ordering the plaintiff's attorney to pay the costs. *Hasluck v. Watson*, 2 *Kerr* 362.

**19—Rule nisi—Remodelling of rule.**

Where a rule *nisi* has been granted to enter a non-suit pursuant to leave reserved at the trial the Court may remodel the rule, and order a new trial on payment of costs by the plaintiff. *Doe dem. Bryson v. Fleet*, 1 *Pug.* 348.

**Discharging rule for peremptory undertaking Enlarging rule.**

See Judgment as in case of Non-suit.

**20—Leave to amend—Duty of party.**

It is the duty of a party who has obtained leave to amend his pleadings to take out the rule and serve it on the opposite party, and if he omits to do so, he cannot set up his ignorance of the terms of the rule as an answer to a proceeding taken by the opposite party in consequence of the conditions of the rule not having been complied with. A party who obtains leave to amend his pleadings on payment of costs, is bound to pay the costs within a reasonable time after taxation. *Patterson v. Patterson*, 1 *All.* 400.

**21—Enquiry of damages—Rule for on payment of costs—Non compliance.**

Where the Court grants a rule for a new enquiry of damages on payment of costs, but the plaintiff does not comply with the terms of the rule and pay the costs, the practice is to grant a rule to discharge the previous rule, unless the costs are paid by a certain time. *McDonald v. Cumming*, 2 *Pug.* 378.

**22—Attachment—Enlargement of rule for.**

A motion made to enlarge a rule *nisi* for an attachment, though a majority of the Court were opposed to granting the motion, yet there being a minority in favour of it, and as an attachment could only go with the consent of all the Judges, it was granted. *Jones v. Smith*, 2 *Pug.* 45.

**23—Enlarging rule—Omission to serve.**

Where the Attorney had forgotten to serve a rule *nisi* for a new trial, until after the beginning of the term at which it was returnable, the court enlarged the rule on payment of costs—it appearing that the opposite attorney knew the rule had been granted and that he had taken no steps towards entering judgment on the verdict. *Martin v. Peters*, 6 *All.* 327.

**24—Four day rule.**

When judgment is signed in term and twenty days have expired since verdict, not necessary to enter a four day rule. *Jones v. Botsford*, 3 *Pug.* 489.

## IX.

## NOTICES.

**1—Notice of trial—Time of taking effect.**

A notice of trial sent to the defendant's attorney through the post office, can only take effect from the time it is received. *Crane v. Taylor*, 2 *Kerr* 171.

**2—Receipt of notice.**

An affidavit of the defendant's attorney that he did not receive any notice of trial, is not sufficiently answered by shewing that a letter containing such notice, directed to the attorney, was put in the post office in due time, it not



appearing to have been received by the attorney. *Fraser v. Harding*, 2 Kerr 375.

**3—Requisite notice—Days.**

The rule of Hil. T. 9 Geo. IV., requiring “at least fourteen days notice of trial”—means fourteen clear days; therefore a notice served on the 12th for the trial of a cause on the 26th of the same month is insufficient. *Grumble v. Perley*, 1 All. 376.

**4—York sittings.**

Under the rule of Court Michaelmas Term 1 Vic., thirty days’ notice must be given of a motion for a new trial from the York sittings, although points have been reserved at the trial. *Turner v. Hammond*, 2 Kerr 536.

**5—Term’s notice.**

Where a year has elapsed after issue joined without any proceedings in a cause, a term’s notice must be given of the plaintiff’s intention to proceed. *Connell v. Sisson*, 4 All. 504.

**5 a—Term’s notice—When not necessary.**

A term’s notice of intention to proceed is not necessary though four terms have elapsed since issue joined, provided the plaintiff brings the cause to trial at the first circuit when it could be tried after issue joined. *Justices of Northumberland v. Russell*, 1 Pug. 345.

**6—New notice—When necessary.**

There must be a new notice of trial when the cause is made a remanet, or put off by rule of Court or order of *nisi prius*. *Fraser v. Harding*, 2 Kerr 575.

**Notice of trial not given—Setting aside verdict.**

*See Supra VI. 19.*

**7—Costs—Review of taxation.**

As a general rule, notice of an intended motion to review taxation of costs must be given as soon after the taxation as circumstances will permit. *Doe d. McCallum v. Roe*, 2 All. 143.

**8—Bail—Notice of render.**

*See Bail 35.*

**9—For allowance of interest.**

Notice should be given of an application to be allowed interest on the affirmance of a judgment in error. *Mills v. Vail*, 4 *All.* 629.

**10—Inquiry—Countermand.**

Notice of countermand not sufficient to save costs for not proceeding to execute a writ of inquiry, unless given at least ten days before the time appointed for the inquiry. See General Rules 77.

**11—Countermand—Inquiry—Sufficiency of notice.**

A notice of inquiry is not sufficiently countermanded, unless it is communicated to the Sheriff; therefore where the plaintiff's attorney gave a notice of countermand to the defendant but omitted to inform the Sheriff, who on his way to execute the writ, according to the original notice, told the defendant that it would be executed on that day—it was held that the defendant was justified in attending and was entitled to his costs of such attendance, notwithstanding the notice of countermand. *Wallace v. Scott*, 1 *All.* 261.

**12—Notice—When necessary.**

If four terms have elapsed since signing interlocutory judgment, a term's notice of executing a writ of inquiry is necessary. *McDonald v. Upton*, 8 *Kerr* 565.

**13—Term's notice—When necessary.**

If four terms have elapsed after issue joined, without any proceeding being taken in a cause, a term's notice of the plaintiff's intention to proceed must be given, though a year may not have elapsed. *Collins v. Kerlin*, 4 *All.* 505.

**14—Joint debtors—Service on one only—Entitling notice of trial.**

In an action against two joint debtors where one only was served with process, a notice of trial entitled "Between S., plaintiff, and C. and K., defendants," was held to be properly entitled.

*Semble*—That though the title of the cause is irregularly

stated, the notice of trial will be sufficient if the defendant is not misled by it. *Sears v. Cohill and Killane*, 2 P. & B. 801.

**Notice of meeting of arbitrators.**

*See Arbitration IV.*

**Notice of appeal.**

*See Supra V. 8. See further—Notice, etc.*

**Demurrer—Setting down cause for argument.**

*See Infra XI. 8.*

## X.

### INQUIRY (WRIT OF).

#### 1—Defence—Credit—Agent.

After judgment by default on common counts for work and labour, etc., the defendant may shew on the execution of writ of inquiry that he contracted merely as agent of the person to whom the credit was given. *Falls v. Sargent*, 3 Kerr 248.

#### 2—Interlocutory judgment—Revival.

It is not necessary to issue a *scire facias* to revive an interlocutory judgment more than a year old before issuing a writ of inquiry. *Ibid.*

#### 3—Term's notice.

If four terms have elapsed since signing interlocutory judgment, a term's notice of executing a writ of enquiry is necessary. *McDonald v. Upton*, 3 Kerr 565.

#### 4—Writ—Direction—Judge—Return.

Where a writ of enquiry is ordered to be executed before a Judge at *nisi prius* the Judge sits only as an assistant to the Sheriff. The writ should be directed and the inquisition returned as in ordinary cases. A writ directed to the Sheriff and Judge, and an inquisition returned under the seal of the Judge is a nullity and is not waived by the defendant's attending and taking part in the inquisition. *Fowlie v. Stronach*, Ber. 57.

#### 5—Setting out declaration in writ.

*Quære*, Whether whole declaration should be set ou

in writ, where, on a special case, the Court held that plaintiff was entitled to recover only on some of the counts. If so, writ may be amended. *Kinnear v. Robinson*, 2 *Han.* 78.

#### **6—Order ex parte—Judge—Vacation.**

An order for executing a writ of inquiry before a Judge *at nisi prius*, obtained *ex parte* from a Judge in vacation, is irregular, and the inquisition will be set aside. *Cunard v. Fraser, Mich. T.* 1884.

#### **7—No verdict—Second writ.**

If the jury summoned on a writ of inquiry are unable to agree and are discharged, a new writ may be issued without applying to the Court. *Ward v. Dow, Ber.* 21.

#### **Setting aside proceedings on writ of inquiry.**

See *Supra* VI. 20-22—Judgment by default.

#### **Countermand of notice.**

See *Supra* IX, 10, 11.

### **XI.**

#### **DEMURRER.**

See Amendment—Pleading.

**1** ——— Court has no power to set aside a demurrer as frivolous. *Petty v. Hammond*, 3 *Kerr* 686.

**2** ——— Objections of form to a summary writ cannot be taken advantage of on demurrer. *Stephenson v. McLean*, 1 *All.* 19.

#### **3—Setting down cause for argument.**

A party whose pleadings are demurred to, wishing to set the cause down for argument, must give eight days' notice to the opposite party. *Smith v. Durnin*, 1 *All.* 263.

#### **4—Admission from—Plea—Costs.**

Where a cause has been set down for argument on demurrer to a plea, and the defendant obtains leave to amend on payment of costs, he thereby admits that the plea is bad; and he cannot afterwards, by refusing to pay the costs, be allowed to argue in support of it. The plaintiff in such case is entitled to judgment on demurrer. *Home v. Carson*, 3 *Kerr* 111.

**1—Objections—Former pleading.**

Where one party demurs to any pleading, the only objections which the other party can make to the former pleadings are those which go to the substance, not the form of such former pleadings. *Mechanics' Whale Fishing Company v. Whitney*, 8 Kerr 812.

**6—Conclusion—Sufficiency.**

A demurrer is sufficient in form though it does not conclude with a prayer of judgment. *Tower v. Cox*, 1 Pug. 328.

## XII.

## FEIGNED ISSUE.

**1—Doubtful facts.**

Where some of the material facts necessary to be explained in opposing a motion to set aside a judgment on a warrant of attorney, were left doubtful by the affidavits, the Court ordered feigned issues to determine those facts. *Lunt v. Estabrooks*, 8 Kerr 144.

**2—Evidence under.**

On a feigned issue, directed to try whether by the agreement and intent of the parties a certain judgment had been fully satisfied by a settlement made between them in July 1843, a levy on all the defendant's property on the 9th October, 1843, appeared in evidence. *Held*, That under the terms of the issue the defendant could not avail himself of such levy as any satisfaction of the judgment. *Lunt v. Estabrooks*, 8 Kerr 291.

**3—Bond and warrant of attorney—Transactions.**

On a motion to set aside a judgment entered upon a bond and warrant of attorney, where the transaction which led to the giving of the bond and warrant is not satisfactorily explained, and it is questionable whether the debt for which the security was taken, was not satisfied before the entry of judgment, the Court may in its discretion order an issue to be tried, in order that the facts may be ascertained before a jury, and will direct the proceedings on the motion in the mean time to be stayed. *Gilmore v. Downes*,

## XIII.

## ARREST OF JUDGEMENT.

1———In an action for slander, the defendant pleaded the Statute of Limitations: plaintiff replied, that a previous action was brought for the same slander in due time, in which he had obtained a verdict and judgment had been arrested (setting out the proceedings in the action as matter in *pais*, without any averment *prout patet per rec.*); and that the present action was brought within a year after such arrest of judgment. Rejoinder, That there is not any record of the several proceedings (setting them out *seriatim.*) Sur-rejoinder, A repetition of the replication. *Held*, on demurrer, That the arrest of judgment should have been entered of record, and pleaded as such. *Beardsley v. Dibblee*, 1 Kerr 642.

2———Where the cause of action, as laid in the declaration, is proved, the plaintiff cannot be non-suited on the ground that the facts proved do not make out a cause of action: he must move in arrest of judgment. *Cameron v. Beardsley*, 2 Kerr 598. (*See Non-suit.*)

3———If the defendant takes issue upon the facts alleged in the declaration, and they are proved, the plaintiff cannot be non-suited on the ground that those facts do not disclose a cause of action; but the defendant must move in arrest of judgment. *New Brunswick vnd Nova Scotia Land Company v. Kirk*, 1 All. 448.

4———It is not a ground for arrest of judgment that the declaration is entitled generally of a term, and that the cause of action appears to have accrued on a subsequent day in the term. *Williston v. Pierce*, 2 All. 162.

5———Where the declaration alleged a custom as the foundation of the cause of action, and the defendant took issue thereon, which was found in favor of the plaintiff, it is no ground for a new trial that the custom proved is invalid. The objection should be taken by demurrer or motion in arrest of judgment. *Breen v. Elkin*, 4 All. 187.

6———It is no ground for arresting the judgment in an action on a replevin bond, that the bond, as stated in the

declaration, is not in the form prescribed by the Act, if the bond itself is correct. The variance might be amended even after notice of motion in arrest of judgment. *Steen v. Hanson*, 4 All. 459.

See Bills and Notes I. 5.

#### XIV.

##### INCIDENTAL PROCEEDINGS.

##### 1—Review from Justice's Court.

Court will not receive affidavits to falsify return of Justice. See Justice of the Peace.

2—Party obtaining order for review has the right to begin. *Bustin v. Howell*, 1 All. 596.

##### 3—Set-off—Judgments—Lien.

When the Court allows one judgment to be set off against another, it must be subject to the attorney's lien generally, and not merely to the extent of the taxed costs in the particular suit. *Rogers v. Ledden*, 2 Kerr 59.

*Semle*, The Court will allow a judgement of the Inferior Court of Common Pleas to be set off against a judgment obtained in this Court, although the action in the Common Pleas may have been brought in the name of another person; the defendant in this Court having the sole beneficial interest therein. *Ibid*.

##### 4—Verdict—Judge—Power on trial.

At the trial of a cause a Judge has not power, without the consent of parties, to direct a verdict to be given for the plaintiff, subject to be set aside, and verdict entered for the defendant upon points reserved. This can only be effected by the jury finding a special verdict where no consent is given. *Hughes v. Sutherland*, 1 Kerr 574.

##### 5—Similiter.

By the practice of the Court a cause is at issue though no similiter has been added. *Doe v. Smith*, 1 All. 580.

##### 6—Pleading and notice of defence.

If two pleas are pleaded and a notice of other matters of defence are given, under the Act 18 Vic. cap. 32, the

plaintiff is not justified in treating them as a nullity; but should apply to a Judge to set them aside. *Oulton v. Palmer*, 2 All. 864.

**7** ————— Continuances may be entered at any time before final judgment. *McDonald v. Upton*, 8 Kerr 865.

**8** —Costs—Acquitted defendant—Certificate of Judge—Granting—Separate judgments.

See Costs 97.

**9** —Concurrent writs—Arrest.

Where two writs for the same cause of action were simultaneously issued to two counties, and the defendant was arrested on both, application should be made to the Court for relief. *Johnston v. Bransfield*, Ber. 78.

**10** —Particular practice must be strictly followed—Letting in to defend.

Where any particular practice has been prescribed by Statute, it must be strictly followed. *Held*, therefore, That the Act of Assembly requiring defendants in summary actions to plead within thirty days after the return of the writ, is imperative, and that the plaintiff is not bound to receive the plea after the thirty days, although it be tendered before the interlocutory judgment and at the same time with the entry of special bail. The defendant, however, after interlocutory judgment, may under the Act be let in to plead upon the usual terms. *Lingley v. Huestis*, 2 Kerr 4.

**11** —Time for pleading—Demand of plea.

Under the practice of the Court a defendant who has appeared, has twenty days to plead from the time of service of a copy of the declaration; and a demand of plea cannot be made before the expiration of such twenty days, although the rule to plead, entered at the time of filing the declaration, may have sooner expired. *Fawcett v. Nethery*, 2 Kerr 81.

**12** —Record entitling.

A Record is properly entitled of the term in which issue is joined, though the judgment is not signed until a subsequent term. *McLean v. Hubbel*, 3 Kerr 685.



**13—Cause struck off special paper—Re-entry of same.**

A clause being struck out of special paper may be entered again at a subsequent term without special permission of Court, if the entry is made at proper time. After the time prescribed by rule of Court for making entries in the different papers, no cause can be entered at that time without license of the Court. *Milner v. Brydges*, 2 P. & B. 87,

**Striking cause off special docket—Defendant having no bona fide defence—Judge's discretion.**

*See* Trial 7.

**14—Irrregularity of defendant's proceedings—Waiver by plaintiff—Signing judgment after.**

Where the defendant's proceedings were irregular, and the plaintiff after a waiver of the irregularity, signed judgment and issued execution, the judgment and execution were set aside, but without costs. *Dever v. Wiley*, 1 P. & B. 507.

**15—Consent rule—Production of agreement only—Sufficient to require defendant to confess.**

*Held*, by Allen, C. J., Weldon, Fisher and Duff, J. J., (Wetmore, J., dubitante) That on the production of the agreement for the consent rule, without production of the rule itself, the defendant is bound to confess lease entry and ouster, and on failure to do so, the judge should direct a nonsuit to be entered. *Doe dem. Johnstone v. Milne*, 2 P. & B. 375.

**16—Several demises—General verdict.**

Where there are several demises in a declaration in ejectment, and a general verdict for the plaintiff, the defendant cannot apply to confine the verdict to one count, he should move for a new trial if there is no evidence to sustain the verdict on one of the Counts. *Doe dem. Spence v. Welling*, 6 All. 479.

**17—Several issues—Finding of jury—Right of plaintiff—Costs.**

Where there are several issues, and plaintiff entirely fails upon one, so that his cause of action is gone, neverthe-

less if there is evidence for the jury upon the other issues, it seems that he is entitled to have the finding of the jury upon those issues, and that the costs of the several issues will follow the respective findings thereon; but in such a case, where defendant moved for a non-suit, and plaintiff's counsel did not insist on the case going to the jury. *Held*, That he could not afterwards have the non-suit set aside, or a verdict entered for him, even upon those issues, on which, if the case had been left to the jury, he must clearly have succeeded. *Smith v. Isolated &c. Fire Ins. Co.*, 2 P. & B. 81.

**18—Suggestion of amendments.**

The Court will not suggest amendments to pleadings which counsel have not asked for, although there is an agreement by counsel on both sides that Court may be at liberty to allow pleadings to be amended to meet case. *Bangor Ins. Co. v. McLeod*, 2 P. & B. 86.

**Demurring and pleading—Trial of issue.**

Where leave to both plead and demur is given, unless the Judge allows the issues in fact to be tried first, the issues in law shall be first disposed of. *Lloyd v. Union Ins. Co.*, 8 Pug. 78.

**Replevin—Trial of claim—Claimant should begin.**

*See* Replevin 45.

**Party having leave to amend should take out rule.**

*See* Supra VIII. 20.

**Death of plaintiff or defendant—Proceedings.**

*See* Death.

**Appeals.**

*See* Appeals.

**Assessment—Damages.**

*See* Assessment, Damages, Bond.

**Particulars—Sufficiency of—Supplying defects.**

*See* Particulars.

**Affidavits.**

*See* Affidavits.

**Leave to file in answer to new matter.**

*See Affidavits VI. 8.*

**Insolvent confined debtor—Payment of weekly allowance.**

*See Insolvent Confined Debtor.*

**Application for discharge—Costs.**

*See do.*

*See various titles—Amendments, Attachment, Bail, Certiorari, Execution, Estoppel, Enlarging Rule, Entry of Cause, Execution, Filing Papers, Mandamus, Supersedeas, etc., etc.*

### **PRACTICE AT NISI PRIUS.**

*See Trial.*

### **PRACTICE IN EQUITY.**

#### **I. PRACTICE IN GENERAL.**

#### **II. INJUNCTION.**

#### **I.**

#### **PRACTICE IN GENERAL.**

#### **1—Reference—Maintenance of children—Extravagant allowance—Further reference.**

Where, on a reference as to the amount to be allowed for the maintenance of children, it appeared that the amount recommended for past maintenance was extravagant, considering the ages of the children, and some of the charges were otherwise objectionable; and the sum recommended for future maintenance appeared to be in excess of their income, and made no distinction in respect to their ages,—one of them being but four years old. The case was sent back to the barrister for further consideration. *Ex parte Gilbert, Allen, J., January 1868.*

#### **2—Costs—Allowance of—Reference—Party making improper claims.**

On a bill filed for an account, the defendant, by his answer, denied any liability. A decree was made for an account, and a reference ordered, and, on taking the accounts, the plaintiff claimed more than he was entitled to, and the defendant improperly resisted what he was clearly

liable for. On exceptions to the barrister's report, an amount less than he claimed was decreed to be due to the plaintiff, and the question of costs was reserved. On appeal by the plaintiff this decree was varied, the Court of Appeal deciding that the accounts should have been taken on a different principle from that adopted either by the Judge or by the barrister on the reference. *Held*, That as the plaintiff was justified in filing the bill, he was entitled to the general costs of the cause up to the time of the decree of reference, and the costs of the hearing on further directions; but that having made improper claims before the barrister, and having thereby unnecessarily increased the expense, he was not entitled to the costs of the reference. *Ryan v. Keith, Ritchie, C. J., January 1868.*

**3—Injunction—Application *ex parte*—Duty as to statement of facts—Dissolution—Use of answer.**

It is the duty of a person applying for an injunction *ex parte*, to state not only all the facts in his knowledge which he may believe to be important, but all that might influence the Court in determining the question; and if he omits to do so, the injunction will be dissolved on that ground, without reference to the merits. *Coy v. Coy, Allen, J., April, 1868.*

A bill filed for an injunction should contain all the charges intended to be proved against the defendant; and if the facts stated in the bill are answered, or are insufficient to entitle the plaintiff to an injunction, an injunction granted *ex parte* will be dissolved, though the plaintiff, in answering the defendant's affidavits, sets up new facts, which would have entitled him to an injunction if they had been stated in the bill. *Ibid.*

Where an injunction was retained till defendant had answered; after which he moved to dissolve it, and the notice of motion referred to the leave given to defendant to apply to dissolve the injunction after putting in his answer. *Held*, That the defendant might use his answer as an affidavit on such application, and that the filing a replication did not prevent its being so used. *Coy v. Coy, Allen, J., April 1868.*

**4—Injunction—Restraining administrator—Matters of appeal from Probate Court.**

Where license to sell land had been granted to an administrator by the Probate Court, an injunction will not be granted to restrain him from selling, on the ground that he had not fully accounted for moneys which came to his hands as administrator; or, that the personal estate was sufficient to pay the debts; or, that the costs were improperly allowed in the Probate Court—these being matters of appeal from the decree of the Probate Court. *Ibid.*

**5—Death of one of several defendants—Infant heirs—Service.**

Where one of the defendants in a suit for foreclosure, died, after order to take the bill *pro confesso*, leaving infant heirs, an order was made to revive the suit against them, under the Act 17 Vic. cap. 18, sec. 30, and a copy of the order to revive was directed to be served on each of them and on their father. *Collins v. Carmichael, Allen, J., May 1868.*

**6—Examiner's fees—Refusal to proceed.**

A cause was set down for hearing, pursuant to Act 26 Vic. cap. 16, after evidence taken before an Examiner; at the hearing, the defendant's counsel objected to proceed, on the ground that the defendant's evidence had not been completed,—the Examiner having refused to proceed with the examination unless his fees for taking the defendant's evidence up to that time were paid. *Held*, That if the Examiner was wrong in refusing to proceed, the defendant might have applied to the Court to compel him to do so; or, that he should have applied to set aside the order for hearing. But, under the circumstances, the hearing was postponed on payment of costs by the defendant, and on his undertaking to proceed with the examination within thirty days. *Vernon v. Gilbert, Allen, J., May, 1868.*

*Semble*, That an Examiner may require payment of his fees *de die in diem*. *Ibid.*

**7—Costs refused—Delay.**

Where an *ex parte* injunction was dissolved because the

plaintiff had not fully stated the facts, the defendant was refused costs in consequence of delay in applying to dissolve, he having allowed two applications to be made against him for attachments for breaches of the injunction, and having applied for time to answer both those applications. *Foster v. Dowling, Allen, J., August 1868.*

**8—Interrogatories—Service—Pleading to bill.**

A plaintiff is not bound to serve a copy of the interrogatories on the defendant, nor can a defendant, who has appeared and been served with a copy of the bill, move to dismiss the bill because no copy of interrogatories has been served on him. Under the orders of July 1853 (No. 7) a defendant may plead, answer or demur to a bill, though no interrogatories have been delivered. *Pitfield v. Ranney, Ritchie, C. J., November 1868.*

**9—Filing of bill—Time imperative—Dismissal of suit.**

The words of the 4th section of the Act 17 Vic. cap. 18, requiring the bill to be filed within three months after the defendant's appearance, are imperative; and if the bill is not filed within that time, the suit will be dismissed. This defect cannot be remedied under the 23rd section of the Act. *Clementson v. Cooper, Allen, J., December 1868.*

**10—Filing demurrer—Defendant's right—Waiver of objection.**

A defendant cannot file a demurrer as a matter of right after the expiration of a month after a service of a copy of the bill and interrogatories, as required by Act 17 Vic. cap. 18, sec. 7; and if so filed, without leave, it may be ordered to be taken off file. The objection is not waived by the plaintiff's solicitor accepting a copy of the demurrer without objection—the application to take the demurrer off file having been made within a few days afterwards. *McCourt v. McCarthy, Allen, J., December 1868.*

**11—Defendant filing demurrer with knowledge of bill not filed in time—Plaintiff's right to take advantage of irregularity in it.**

Though a suit may be dismissed if the bill is not filed within three months after the defendant's appearance: if

defendant, knowing that the bill has not been filed within that time, files a demurrer thereto, the plaintiff may take advantage of any irregularity in it. *McCourt v. McCarthy, Allen, J., December 1868.*

**12—Trustees—Authority to appoint—Meaning of term “incapacitated.”**

A testator by his will appointed seven trustees, and directed that if any of them should die, or refuse to take upon them the execution of the trusts, or become incapacitated to act, the remaining trustees should appoint. *Held*, That the term “incapacitated” meant a personal incapacity to act, and that the insolvency of one of the trustees did not authorize the others to appoint in his place. *In re Smith's Trustees, Allen, J., April 1869.*

The Court has power to appoint a new trustee in such a case under the 82nd section of “The Trustee Act, 1850,” 30 Vic. cap. 16. *Ibid.*

**13—Cestui que trust—Appointment as trustee.**

A *cestui que trust* is not disqualified from being appointed a trustee, though it is generally objectionable; and where such an appointment was asked, notice of the application was ordered to be given to the persons interested under the will. *Ibid.*

**14—Foreclosure—Subsequent judgment creditor made defendant—Omission of name in decree—No day given to redeem.**

In a suit for foreclosure of a mortgage, a subsequent judgment creditor of the mortgagor, with a registered memorial, was made a defendant; but in the decree of foreclosure *nisi* he was not mentioned, and no day was given him to redeem; a decree of foreclosure absolute was refused, on proof of non-payment of the money by the mortgagor at the day appointed. *Richards v. Short, Allen, J., Nov. 1870.*

**15—Memorial of judgment—Proceedings at law first necessary before resort to Equity Court.**

A decree will not be made for the sale of land bound by a memorial of judgment, unless the judgment creditor

shews some reason why he could not have obtained the fruits of his judgment by an execution. Where a judgment creditor has a legal charge, he must take all necessary proceedings at law to enforce his claim, before he can ask the assistance of a Court of Equity. *Robertson v. Armstrong, Allen, J., November 1870.*

**16—Maintenance of infants—Father's duty—Reference for further inquiries.**

During the lifetime of a father, maintenance for his children will not, as a general rule, be ordered out of their property—it being his duty to support them, if able. Where children were of the respective ages of five, seven and ten years, with a joint income of \$1000 per annum, and the barrister reported that this sum would be sufficient to support and educate them during their minority, and recommended that it should be so appropriated; the case was referred back for further inquiries as to the amount necessary for the maintenance and education of these children—1st, till twelve years of age; 2nd, from twelve to sixteen years; and 3rd, from sixteen till their majority. *Ex parte Stymest, Allen, J., Nov. 1870.*

**17—Injunction—Title to sustain—Prima facie right—Conflicting affidavits—Restraint in meantime—Ground for injunction—Continuous injury.**

Where the plaintiff is in possession of land, and shews a *prima facie* right to it, and it is not clear that there is any *bona fide* dispute about the boundaries, he has sufficient title to sustain an injunction to prevent the overflowing of the land. *Weeks v. Dodds, Allen, J., August 1869.*

Where the affidavits were conflicting as to the effect of a mill-dam in overflowing the plaintiff's land—the defendants affidavits denying that it had ever done so—and an action at law was pending to try the rights of the parties, the defendants were restrained from repairing the dam in such a manner as to overflow the plaintiff's land in the meantime. *Ibid.*

If the fact of overflowing land by means of a mill-dam is established, and it would be a continuous injury to the



plaintiff's land, and deprive him of the use of part of it, it is a ground for an injunction. *Ibid.*

**18 — Objection — Bill not filed — Defendant having answered, too late to object.**

It is too late, after the defendant has answered, to object that the bill was not filed within the time required by the Act 17 Vic. cap. 18, sec. 4. *Hallett v. Hodgens, Allen, J., August 1869.*

**19 — Order pro confesso — Filing bill — Plaintiff when entitled.**

Where an order is made for the appearance of an absent defendant, the plaintiff is not entitled to file his bill and obtain an order *pro confesso*, till the expiration of forty days after the time limited by the order for the defendant's appearance, under the Act 17 Vic. cap. 18, sec. 4. *McLeod v. Perry, Allen, J., Aug. 1869.*

**20 — Costs — Demurrer to part of bill — Pleading to remainder — Setting down demurrer only for argument.**

The defendant demurred to part of a bill, and pleaded to and answered the remainder. The plaintiff set the demurrer only down for argument, whereupon the defendant applied for the costs of the plea. *Held*, That according to the 14th order of August 1842, the plaintiff should have set the plea down for argument at the same time as the demurrer, and was not justified in waiting till the decision of the demurrer. Defendant allowed the costs of the plea, unless the plaintiff replied thereto in seven days. *Buchanan v. Peters, Allen, J., March 1871.*

**21 — Answer not filed in time — Motion to take off file — Time of operation of order — Duty of party applying — Practice of Clerk.**

A demurrer to part of a bill was overruled on the 8th March, and the defendant allowed seven days to answer. The defendant's solicitor was not aware that the order was made till the 21st March, when he took out the order, served a copy on the plaintiff's solicitor, and filed his answer. On motion by the plaintiff to take this answer off file, as not being filed within the time allowed by the order—the answer

was allowed to stand, on payment of the costs of the motion, it not being clear from the minute of the order, whether the time for answering began to run till after service of the order. *Buchanan v. Peters, Allen, J., June 1871.*

As a general rule, an order operates from the time it is pronounced, and not from the time it is drawn up. It is the duty of a party applying to the Court, to ascertain the result of his application, and see that the order is properly entered. *Ibid.*

It is not the practice for the clerk to submit to the solicitors the minutes of interlocutory orders, before drawing them up. *Ibid.*

### **22—Injunction standing—Obedience—Legislative Act.**

As a general rule, while an injunction stands, it must be obeyed, though it may have been improperly granted, and would be dissolved on application. *Valentine v. Hazelton, Allen, J., December 1870.*

An injunction was granted, directing a sheriff not to discharge a debtor in his custody on execution, under any Act of the Local Legislature, passed or to be passed. Subsequently, an Act of the Local Legislature (33 Vic. cap. 22) was passed, declaring that no person should be held imprisoned in any civil suit longer than two years; and that when any person should be so confined, the Sheriff should forthwith discharge him, and should not be liable for an escape, or in any other suit in consequence thereof. The defendant having been confined in a civil suit upwards of two years, demanded and obtained his discharge from the Sheriff. *Held*, That the Act released the Sheriff from obeying the injunction; and therefore an attachment against him was refused. *Ibid.*

The Act 33 Vic. cap. 22, relating to imprisonment for debt, does not come within the prohibition of the 91st section of "The British North America Act, 1867," par. 21, "*Bankruptcy and Insolvency.*" *Ibid.*

### **23—Appearance of Defendants—Allowance of—Affidavit for appearance of absent defendant—Necessary statements to obtain order.**

An order for the appearance of two of the defendants,

residing in England, had been published in the *Gazette*, according to the Act 17 Vic. cap. 18, sec. 3, and an order made to take the bill *pro confesso* against them at the hearing. Afterwards, before the hearing of the cause, these defendants were allowed to appear on payment of costs, though they were aware, several months before, that the cause was pending, and might have appeared before the order to take the bill *pro confesso*. *Putnam v. Casco Bay Copper Co.*, *Allen, J.*, Dec. 1871.

Where application is made for an order for the appearance of an absent defendant, the affidavit should state (if within the plaintiff's knowledge), whether such defendant has a known place of residence abroad, or, should shew that the plaintiff has no means of ascertaining the defendant's residence. See General rule, Trin. T. 1856. *Ibid*.

**24—Demurrer overruled—Answer allowed—Exceptions—Costs.**

A defendant declined to answer part of a bill, and demurred thereto : the demurrer was overruled, and defendant was allowed to answer within a certain time, but having neglected to do so, the plaintiff filed exceptions to the existing answer because it left part of the bill unanswered. A sufficient answer having been afterwards put in,—*Held*, That the plaintiff was entitled to the costs of the exceptions, as it was the defendant's duty to ascertain the result of his application and to file his answer in time. *Buchanan v. Peters*, *Allen, J.*, May 1872.

**25—Costs—Abbreviations—Same counsel—Interrogatories—Irrelevant matter—Part transactions—Answer by defendants concerned in.**

Where the same counsel appears at the original hearing and on appeal, two copies of the abbreviation of the pleadings will not be allowed in the costs. *Frye v. Prescott*, *Allen, J.*, March 1869.

Where a bill was filed, principally for specific performance of an agreement, by one of the defendants to assign a mortgage, and to redeem the mortgage as against another defendant ; but it also embraced other matters relating to partnership, etc., with which some of the defendants had

no connection, the plaintiff (though entitled to the general costs in the cause) was not allowed the costs of interrogatories respecting matters enterily irrelevant, of interrogatories to defendants, upon matters which the plaintiff knew to be entirely within the knowledge of the defendants. *Ibid.* 371

Where some of the defendants are concerned only in parts of the transactions set forth in the bill, they should only be required to answer such of the interrogatories as relate to those transactions, according to the orders of August 1842. *Ibid.*

**26—Bill—Injunction—Application to dissolve—No answer to bill—Sufficiency of statement—Original application granted.**

A bill was filed for dissolution of a partnership and for the appointment of a receiver. An injunction was obtained on the statements in the bill, (which was sworn to,) restraining the defendant from interfering with the property, which injunction he applied to dissolve, without success and afterwards professed to answer the bill, though no answer was, in fact, filed. The facts stated in the bill were sufficient to entitle the plaintiff to a dissolution. A receiver was appointed, on notice, upon the statements in the Bill. *Barlett v. Stymest, Allen, J., January 1868.*

**27—Filing bill—Time.**

The words "within three months therefrom," in the Act 17 Vic. cap. 18, sec. 4, relate as well to cases where there has been appearance, as to cases where the defendant has appeared: therefore, in cases of non-appearance, the three months allowed for filing a bill, begin to run at the expiration of forty days after service of the summons. *Godfrey v. Reardon, Allen, J., November 1868.*

**28—Bill for foreclosure—Parties—Interest.**

A bill for foreclosure of a mortgage, against three defendants, stated that one of them was mortgagor, and that the others claimed a lien on the property; but omitted to state what interest they had, or anything to shew that they were necessary parties; a decree of foreclosure was refused. *Chipman v. Tuck, Allen, J., April 1868.*

**29—Probate Court—Appeal from Must be made to Court.**

An appeal from the Probate Court must be made to the Supreme Court in term, and not to Judge sitting in Equity : and where such an appeal is made to a Judge, his proper course is to decline to hear it, (having no jurisdiction,) and not to *dismiss* the appeal. *Ex parte Roach, Allen, J., June 1871.*

**30—Disputed Handwriting—Comparison by Judge.**

If on a *viva voce* hearing before a Judge in Equity, there is conflicting evidence of the handwriting of a witness, the Judge has a right to compare the disputed writing with an admitted signature of the witness, in order to determine whether it is his signature. *Hanington v. Harshman, Hil. T. 1873.*

**31—Supplemental answer—Allowance of—Omission of statement of facts—Right of parties interested to be heard against allowance—Adding parties,**

Where a defendant omitted to state certain facts in his answer, on the advice of his solicitor that such statement was unnecessary, and that evidence of the facts would be admissible without it, he was allowed to file a supplemental answer on the affidavit of his solicitor stating these circumstances, and on payment of the costs occasioned to the other parties by his application. *McLeod v. Firth, Allen, J., January, 1873.*

On a bill filed by an executor and trustee for the purpose of obtaining a declaration of the trusts of the will, one of the defendants and devisees claimed that a mortgage given by him for part of the purchase money of property, which he afterwards conveyed to the testator, should be paid out of the estate, on the ground that the purchase was made by him as agent of the testator. On application by this defendant to file supplemental answer in order to give evidence of this fact,—*Held*, That other defendants, interested as residuary legatees under the will, were entitled to be heard against filing the supplemental answer, and to their costs occasioned by the application, on the ground

that this claim, if sustained, would reduce the residuary estates in which they were interested. *Ibid.*

*Semble*, That where land is devised to A. for life, in trust to apply the rents and profits for the benefit of his children ; and after his decease, the property is devised to to his children in fee ; they are necessary parties to a suit by the executor for declaring the trusts under the will. *Ibid.*

Where the objection of want of parties was apparent on the bill, which might therefore have been demurred to ; but was not taken till the cause had been partly heard, and then, in connexion with the defendant's application for leave to file a supplemenal answer, the plaintiff was allowed to amend by adding the necessary parties, without payment of costs. *Ibid.*

**32—Answer on file—Bill cannot be taken *pro confesso*.**

If there is an answer on file, the bill cannot be taken *pro confesso*, whether the fact appears by the admission of the plaintiff's counsel or otherwise. *Lockhart v. Sancton, Allen, J., January, 1870.*

**34—Appeal—Questions of fact—Judgment of Court below—Misjoinder—Failure of proof of allegations in bill—Multifariousness—Where parties cannot be placed in *statu quo*—Deed—Consideration—Intoxication—Incapacity of contracting.**

Where the Judge of the Court below, whose judgment is appealed from, has had the witnesses before him, and heard their testimony, an appellate tribunal will never interfere with his decision upon a question of fact, unless for an error in it which is overwhelming.

An objection that a party was improperly joined as co-plaintiff in a suit in equity cannot be raised as a ground of appeal from the decision of the Judge below at the hearing of the cause, but must be disposed of under the 17 and 18 Vic. cap. 18, sub-chap 2, sec. 24. (Consol. Stat. cap. 49, sec. 50).

The failure of plaintiff at the hearing, to prove one or more allegations in his Bill is not a ground for dismissing

the Bill, if he has proved other allegations which will entitle him to the relief prayed for.

In order to avoid a deed made by a lunatic, or person in a state of intoxication, two things must be established, 1st. His incapacity to contract ; 2nd. His equitable right to be relieved ; and where the incapacity to contract, as the result of dissipation, was established, and inadequacy of consideration shewn, the Court granted relief.

If a Bill does not pray for multifarious relief, it cannot be objected to on the ground of multifariousness, though the facts stated would justify a prayer for multifarious relief. At all events, a defendant cannot raise such an objection at the hearing, although the Court might *sua sponte*.

Where a deed, executed by a person incapable of contracting, as the result of dissipation, might be avoided by reason of the inadequacy of consideration, and the grantor was at times sober and capable of managing his business, he must have been fully informed of his rights, and capable of acting on his own behalf, in order that his not repudiating the deed during his lucid intervals shall amount to acquiescence in it.

As a general rule equity will not interfere with a transaction where all the parties cannot be reinstated, the reason being, not merely the change in the legal title to property, but because new equities have supervened, which would have to be displaced in order to afford the relief sought for ; and it will not refuse to administer an equity and to afford relief, so long as a prior equity is not interposed which would render it inequitable to do so ; and where a person is claiming equitable relief against a wrong-doer, the devisee of the latter can be in no better position than the wrong-doer himself.

Where a deed was given by a person incapable, as the result of intoxication, of contracting, and a part of the consideration was that the grantor was to occupy the premises for a stated period, which had elapsed before a suit to set aside the deed, and to have it treated as a mort-

gage, was brought. *Held*, That is was not necessary for plaintiff to set forth the agreement in the Bill, and pray to have it set aside, both because the agreement had expired by lapse of time, and because, being a part consideration for the deed, when that was disposed of the agreement went with it. *Jones v. Calkin, et al.* 3 *Pug.* 356.

**25—Appeal—Decree not entered up.**

An appeal does not lie from an opinion of a Judge in Equity, the decree not being regularly entered up. *Hodge v. Reid*, 2 *Pug.* 26.

**Appeal from order of Judge—When same should be made.**

See Insolvent Act of 1869. *McLeod v. McLeod*.

**26—Dissolution of an order of injunction—Equity appeal—New state of facts—Judge's power.**

An *ex parte* order of injunction was obtained from a Judge at Chambers to restrain injury to land and an action at law was commenced shortly after. The injunction having been dissolved and the decree of dissolution appealed from. *Held*, That where a new state of facts is presented the power of an Equity Judge to dissolve an injunction is not affected by there being an action at law pending to try the title. *Smith v. Morrow*, 2 *Pug.* 24.

**27—Want of parties—Misjoinder—Want of interest in party—Disclaimer.**

Neither want of parties, nor misjoinder is a ground of demurrer under the Equity Act 17 Vic. cap. 18 sec. 8 and 24. (Consol. Stat. cap. 49, 35, S. S. 44, and 50.)

If a defendant in an Equity suit has no interest his proper course is to disclaim by answer. *Cotton v. Stack* 3 *Pug.* 424.

**Foreclosure—Parties in suit—Debt secured by mortgage—Holder of legal estate.**

Where a debt secured by mortgage on land belongs to one person, and the legal estate in the land is vested in another, both must be parties in a suit for foreclosure. *Ibid.*



**38—Letters referred to in defendant's answer—Judge requiring production of same for inspection—Appeal—Time.**

Where certain letters were referred to in defendant's answer, the Judge in Equity required the defendant to produce them for the plaintiff's inspection, and certain of them were put in evidence on the hearing and the Judge made use of them in arriving at his judgment. *Held* by Weldon, J., That the ruling of the Judge in Equity was correct; by Wetmore, J., That at least it was no ground for appeal. If the order of the Judge in Equity was improperly made, it should have been appealed from at the time. *McLeod assignee, &c., v. Wright. Wright, appellant, v. McLeod, Respondent, 1 P. & B. 68.*

**Bill ordered to be taken off files of Court—Action brought against Committee of Lunatic's estate without leave of Court.**

*See* Action at Law, IX. 82.

**Costs in Equity.**

*See* Costs 57 to 62, 77, 79.

**Impeaching agreement—Necessity of filing cross bill.**

*See* Equity 18.

**Rent and profits—Barrister taking account of before Commissioners divide land.**

*See* Barrister's Report.

**Taking objections with exceptions filed.**

*See* do.

**Inherent power in Court to amend pleadings.**

*See* Amendment I. 18,

**Subsequent alteration of decree—Party not having appeared in suit.**

*See* Divorce.

## II.

### INJUNCTION.

*See* Supra I. 3, 4, 17, 22, 26, 36.

**1—Restraint defendant from proceeding on note—Defence at law—Legal rights.**

The plaintiff drew a promissory note in his own favor,

which he indorsed and delivered to C., to whom he was indebted. C. assigned all his property to trustees for the benefit of his creditors, and the trustees transferred the note to the defendant, who was a creditor of C. Before the transfer of the note, C. had become bankrupt in England. The defendant having brought an action against the plaintiff on the note,—*Held*, 1. That if the plaintiff could set up the right of C.'s assignee in bankruptcy to the note, it would be a defence to the action, and therefore the plaintiff had no right to an injunction to restrain the defendant from proceeding on the note; 2. That though the trust deed gave the trustees no power to sell or assign debts, they had a right to pay the creditors of C. with the assets of his estate in kind, if they were willing to receive them; 3. That though a clause in C.'s trust deed, relative to the dividends due to such of his creditors as should not execute the deed within a limited time, might be fraudulent as between the immediate parties, the plaintiff could not take advantage of it as a ground for restraining the action on the note against him. *Gilbert v. Campbell*, *Hil. T.* 1862.

**2—Saint John Water Company—Rights—Private rights affected—Remedy at law—Delay.**

The Act 2 Wm. IV. cap. 26, incorporating the St. John Water Company, authorized them to draw water from, erect reservoirs on, and carry pipes through private property, as they might think necessary, on paying compensation to the owners for any damage sustained thereby. The Act 12 Vic. cap. 51, authorized the Company, in order to procure a more efficient supply of water, to enter on private property, and "build dams or embankments on any brook, stream, lake or pond, for the purpose of creating artificial ponds or reservoirs, and by such dams or embankments to cause the flowage of such private property, and to continue such flowage as long as they should see fit;" but that no such dams, etc., should be built, or ponds or reservoirs made, or pipes laid down, without compensation to the owner of the land for any damage sustained thereby (pointing out how the damages were to be ascertained in case the parties could not agree). By the Act 18 Vic. cap.

2d. all the rights and powers of the Company were vested in Commissioners. Sec. 7 declared that it should be the duty of the Commissioners "to extend the present water supply as far as they may deem it practicable or expedient, by carrying a sufficient main or mains to Latimer's Lake and Loch Lomond, or either of them," etc. A dam was erected by the Company over a stream called "Little River," the property of the plaintiff's mother, and a reservoir constructed. After her death, in 1856, the dam was continued, and pipes laid down to convey the water therefrom, of which her husband, the tenant by the courtesy, was aware, but took no proceedings to prevent it. The plaintiff, who was the owner of the fee in remainder, filed a bill in 1863, for an injunction to restrain the Commissioners from continuing the dam. *Held*, 1st. That the Company had a right to appropriate the water of any stream that could be made available for the purposes contemplated by the Act. 2nd. That the 7th sec. of the Act 18 Vic. cap. 35. authorizing the Commissioners to take water from Latimer's Lake, did not abridge any rights previously granted, or impliedly restrict the Commissioners from using the water of Little River. 3rd. That if the making compensation to the owner of the land was a condition precedent to the entry and construction of the works by the Company, or the Commissioners, their entry was illegal, and the person whose right was affected had a remedy at law. 4th. That it did not appear that irreparable injury would be done to the property of the plaintiff by the operations of the Commissioners; and that after so much delay with knowledge, or the means of knowledge of the works of the Commissioners, it was too late to interfere by injunction. *Botsford v. Sears*, 6 All. 116.

**3—Restraining Administrator from selling assets to pay debts—No sufficient answer—Injunction not dissolved.**

Where an injunction had been granted *ex parte*, to restrain an administrator from selling land under a license granted by the Probate Court, on the ground that he had sold property under a former license under value, and had

sufficient property in his hands to pay the debts, an application to dissolve the injunction was refused till the defendant had answered, it not being clearly shewn by his affidavits that he had not a portion of the estate in his possession which belonged to the heirs. *Coy v. Coy*, 1 *Han.* 177.

**4—Right of judgment creditor to sell under execution—Restraining sale.**

A judgment creditor has a right to sell under execution an alleged right that his debtor has in certain land; and a party in possession, and claiming the land, cannot restrain the creditor from selling, and thereby acquiring a *locus standi* to contest the title. *Case v. Palmer*, 2 *Han.* 188.

**5—Judgment debtor having no interest—Defence at law.**

If the judgment debtor has no interest in the land levied on, the Sheriff's deed conveys nothing, and the party in possession will have a good defence at law, and therefore does not require the assistance of a Court of Equity. *Ibid.*

**6—Restraining Company from overflowing land until conditions fulfilled.**

The St. John Water Company, in consideration of being allowed to overflow a part of the plaintiff's land, agreed to build a bridge over the overflowage, for the convenience of the plaintiff, and to keep the same in repair as long as the overflowage continued; in accordance with this agreement, they built the bridge. By Act 18 Vic. cap. 38, all the rights and powers of the Company, subject to their outstanding liabilities, were vested in the defendants, who allowed the bridge to get out of repair, though they continued the overflowage; an injunction was granted to restrain them from continuing to overflow the plaintiff's land till the bridge was put in proper state of repair, and also to restrain them from allowing the bridge to remain out of repair while they continued to overflow the land. *Ryan v. Lockhart et al.*, 1 *Pug.* 127

**7—Application ex parte—Party applying must state all important facts.**

Where a party applies for an *ex parte* injunction, he is

bound to state all the facts which are important to be brought before the Court, and which might influence it in determining upon the application ; and if important facts within the knowledge of the party, are omitted, the injunction will be dissolved without regard to the merits. Thus, where an injunction was granted to restrain the defendant from building a wharf beyond the line of high water mark in the harbour of St. John—the plaintiffs claiming by their charter the soil of the harbour, and the space between high and low water mark ; but the defendant held, under a prior grant from the Crown, extending to low water mark, and claimed the right to extend his wharf, as the owner of the land, which facts were known to the plaintiffs, but were wholly omitted from the bill—the injunction was dissolved on this ground alone. *Mayor &c. of St. John v. Brown*, 1 *Pug.* 100

**Unregistered mortgage of ship—Application refused to restrain purchaser from disposing of ship.**

*See Shipping Law 8.*

**Erection of dam in public stream—Restraining destruction of dam by persons not obstructed,**

*See Water Course.*

#### **PRECIPE.**

*See Practice VI. 42.*

#### **PRESENTMENT.**

*See Bills and Notes.*

#### **PRESIDING OFFICER.**

**Right to vote—Return by.**

*See Election Law.*

#### **PRESIDENT.**

**Remuneration.**

*See Corporation 27.*

#### **PRESUMPTIONS.**

*See Evidence VI.*

**Possession of land—Continuance.**

*See Limitation of Action IV. 18.*

**Right of way—Lost deed**

*See Evidence VI. 12.*

**Payment over of money.**

*See Assumpsit III. 14.*

**Sheriff's proceedings—Regularity.**

*See Sheriff's Deed 2.*

**Deed of master in Chancery.**

*See Deed I. 17.*

**Newspaper—Publication.**

*See Joint Stock Company 3.*

**Authority of officer.**

*See Evidence VI. 1, 2, 5.*

**Surrogate—Oath.**

*See do. 1.*

**PRINCIPAL AND AGENT.**

**1—Credit—To whom given.**

Where a purchase is made by an agent, who discloses the name of his principal, it is a question for the jury to determine to whom the credit was given; and where the evidence is conflicting, the Court will not disturb the verdict. *Scott v. Curry, Hil. T. 1834.*

2 ————R., a broker, effected insurance with the plaintiff on account of the defendant; the policy was issued in the name of R., on account of "whom it may concern;" but plaintiff knew at the time, that the insurance was for the defendant's benefit, and that R. was only acting as his agent. The premium was not paid, and it did not appear that the plaintiff had charged it either to the defendant or R., though all the entries relating to the transaction in the plaintiff's books were in R.'s name. No claim was made upon the defendant till about a year after the insurance. *Held*, That the jury were properly directed that if the plaintiff, knowing that R. was only acting as agent for the defendant, gave the credit to R., he could not afterwards look to the defendant for the premium. *Stymest v. Solomon, et al., 2 Han. 6,*

### **3—Subscribers for stock appointing person for specific purpose—Agent—Claim—Commission.**

A person appointed by a number of subscribers for stock in a proposed Joint Stock Company, to receive and remit their subscriptions to the head office of the Company, is not the agent of the latter, and has no claim against the Company for his services. *Quebec and Halifax Steam Navigation Co. v. Cunard, Ber. 47.*

4 ——— The right of an agent to retain money for agency and commission is exercisable only upon the specific money on account of which the charge is made. *Ibid.*

### **5—Agreement—Making of by agent—Estoppel.**

In trover for timber, plaintiffs claimed under an agreement made between D. of the one part, and S. (under whom defendant claimed) of the other, whereby D. granted license to S. to cut timber on certain land,—the timber to remain the property of D. till the stumpage was paid. The agreement was signed by D. "for the proprietors, by J. B." It was proved by D. that the plaintiffs were the proprietors of the land, for whom he acted as agent when he made the agreement. *Held*, 1st. That it appeared by the agreement that it was made by D. as agent for the plaintiffs, and that they could take the benefit of it, (*Ritchie, J., dubitante*). 2nd. That the defendant, claiming under S., could not dispute that the plaintiffs were the proprietors of the land. *Hersay v. Hathewny, 6 All. 237.*

### **6—Authority to appear and defend suits.**

Defendant being about to leave the Province, gave a Power of Attorney to an agent, authorizing him to appear to and defend any action that might be brought against the defendant during his absence. A suit was commenced, and a copy of the writ sent to the agent, who declined to appear. *Held*, That the agent was not bound to appear, and that interlocutory judgment signed for want of appearance, was irregular. *Harris v. Mitchell, 1 Han. 2.*

### **7—Powers and authority.**

Under a power given by the Tobique Mill Company (who

were incorporated by Act of Assembly) to their agent, "to manufacture logs into lumber at the mills, and transport them to market, and sell and dispose thereof for the company's benefit." *Held*, That the agent was not authorized to deliver over the lumber at the mills, without the knowledge of the directors, in payment of securities given by him on behalf of the company, for debts contracted in the course of his agency. Such delivery vests no property in the creditor. *Lombard v. Winslow*, 1 *Kerr* 327.

*Quare*, Whether the Tobique Mill Company could give authority to their agent to make promissory notes, and if he could make them in his own favor. *Ibid*.

§ ———— Where an agent is authorized to receive money only, payment to him by a bill of exchange will not discharge the debtor, although the debtor was ready to have paid his debt in money at the time, and delivered the bill of exchange in lieu of money at the request of the agent. *Crane v. Boltenhouse*, 2 *Kerr*, 581,

But payment to such agent by the promissory note of a third person, indorsed by the debtor for the purpose of being immediately discounted, at a bank, and which is so discounted, and the money therefor received by the agent for his principal, without any liability on the note attaching to the principal, may be considered as a money payment by the debtor. *Crane v. Boltenhouse*, 2 *Kerr* 581.

● ———— The plaintiff entered into a written agreement with B. to supply him with a quantity of logs; B. transferred his right to the logs to the defendants, who entered into the following agreement with the plaintiff: "We agree to pay S. (the plaintiff) the balance that may be due him by B. on account of logs to be furnished by said S. to said B. as per agreement and settlement, when the whole of the logs now remaining on Hovey brook, etc., are driven down past the mouth of Clearwater brook." The plaintiff and B. afterwards made a settlement without the knowledge of the defendants, on which a balance was struck in favor of the plaintiff. *Held*, That B. was not the agent of the defendant for the purpose of this settlement; and that in



an action for the balance, it was necessary for the plaintiff to give in evidence the agreement between himself and B., in order to ascertain whether the settlement was made in accordance therewith. *Sutherland v. Gilmour*, 3 *Kerr* 165.

**10**——The authority of an agent specially authorized to draw a bill of exchange for a particular purpose, ceases on the acceptance, and if the drawer is discharged by want of notice of dishonor, the agent cannot, without further express authority, revive the liability by agreeing to waive the legal discharge. *McGhie v. Gilbert*, 1 *All.* 235.

**11—Liability of agent.**

An agent with power to raise money, whose principal resides abroad, is personally liable to an attorney retained by him to carry on suits for the principal, unless he limits his liability at the time. *Jack v. Clewes*, 3 *Kerr* 637.

**12—Public agents.**

The defendants, under the Act 7 Wm. IV. cap. 28, were by the General Sessions of the Peace for the County of York appointed a committee of management for the erection of a new gaol; and in that capacity contracted with the plaintiff, binding themselves and their successors as such, on behalf of the said county, and subscribing their names "a committee on behalf of the county." *Held*, That they were mere agents for the public, and not personally liable on the contract. *Blair v. Robinson*, 3 *Kerr* 487.

**13—Referees—When agents of parties.**

Plaintiff being lessee of land, assigned one half of it to the defendant, who entered into a bond to pay the plaintiff for half the buildings, such sum as two arbitrators should determine before a certain day; the arbitrators not having been appointed under the bond, the parties afterwards agreed verbally to refer the valuation to arbitrators, who made an award of the value. *Held*, That the referees were the agents of the parties to settle the value, and that the plaintiff might recover the amount awarded by them, as an account stated. *Coram v. Wheten*, 4 *All.* 293.

**14—Policy—Issue—Notice.**

A policy of insurance is considered as issued when the

agent forwards it to the brokers for delivery. (Per Ritchie, J.) *McLaughlin v. Aetna Ins. Co.*, 4 All. 173.

15———Notice of a prior insurance to an insurance broker, is not notice to the Company. *Ibid.*

16—Liability of principal to indemnify agent—Implied contract.

The defendant being the owner of a steamboat of which the plaintiff was master, sent him to the Bend to tow a ship to Saint John: the ship in launching lost her rudder, and was towed in that state to Saint John, and while going into the harbour in the night came in collision with and sunk a schooner, the owner of which recovered damages against the plaintiff for negligence. In an action by the plaintiff against the defendant for indemnity, the declaration alleged, and it was proved, that towing vessels was a dangerous business, and that the danger was much increased by the loss of the rudder: it was also proved that the plaintiff might have replaced the rudder, and need not have entered the harbour in the night. *Held*, (Street, J. *dissentiente*), That the plaintiff must be presumed to have known that he was doing an unlawful act, and therefore there was no implied contract by the defendant to indemnify him against loss; and per Parker, J., even if there had been an express contract to indemnify against such risks, it would be void as being contrary to public policy; and per Wilmot, J., that the plaintiff was estopped by the judgment recovered against him by the owner of the schooner, from disproving his own negligence. *Leavitt v. Parks*, 2 All. 282.

*Held*, also, That the plaintiff's conduct being unlawful no subsequent ratification of his acts by the defendant would make him liable. *Ibid.*

*Held*, per Street J., That to destroy the implied liability of a principal to indemnify, the acts of the agent must be clearly illegal, to his knowledge, and that towing the ship under the circumstances was not so; and therefore if the principal either authorised or approved of the agent's acts, he was liable to indemnify him. *Ibid.*

*Semble*, That if the action was maintainable, the plaintiff would have been entitled to recover the amount of damages and costs in the judgment against him, though he had not actually paid the costs, having given his note therefor on being discharged from custody; but that he would not have been entitled to damages for his imprisonment, if he had the means of paying. *Ibid*.

**17—Accredited agent—Appointment—Seal.**

: In order to prove that a person acting as the agent of a foreign insurance company by issuing policies in their name and receiving premiums thereon, is their accredited agent, it is not necessary to shew his appointment under the corporate seal. *Robertson v. The Provincial Mutual and General Insurance Company*, 8 *All.* 379.

**18—Proof—Writing—Parol.**

*Semble*, That the fact of agency may be proved by parol, though the appointment was in writing. *Wilson v. Street*, 8 *All.* 251.

**19—Ratification of acts of Agent.**

D., a plumber, working on defendant's house, addressed to him a memorandum stating that he would require to send to plaintiffs in Boston for certain articles specified, which defendant gave to T., an expressman, who handed it to plaintiffs. Plaintiffs treated it as an order from D., with whom they had dealings, and sent the goods and invoice to him by T., and D. refused to receive them. T. then delivered them to defendant, who paid T. for them and took his receipt. Plaintiffs remaining ignorant of this transaction demanded payment of D., which he refused. *Held*, 1st. That by bringing assumpsit for goods sold and delivered against defendant they waived the tort, ratified the sale by T., and treated him as their agent and payment to him discharged defendant. 2nd. That the plaintiff might have maintained trover against defendant for a wrongful conversion. *Dalton et al. v. Hamilton*, 1 *Han.* 422.

**20—Adoption of Acts of Agent—Liability of principal.**

When the commercial traveller of a wholesale firm of

merchants took an order for a quantity of goods, and the firm on receipt of the order shipped a portion of the goods and promised to forward balance. *Held*, that having thus adopted the acts of their agent, they could not afterwards repudiate his authority, and were liable to plaintiff for damages for not supplying all the goods ordered. *Lucy v. Donovan*, 3 *Pug.* 128.

**21—Set off—Right of—Demand not due.**

M. had a quantity of oil in his possession as factor to sell for plaintiff. Defendant purchased the oil of M. not knowing it belonged to plaintiff. At the time of the purchase the defendant held a note made by M. for goods previously sold him which however was not due at the time of the purchase of the oil and did not mature until after defendant had received notice of M.'s agency.

*Held*, in an action brought by K. to recover for the oil, that defendant could not set off the amount of the note which he held against M. *Kennedy v. Turnbull*, 2 *Pug.* 378.

**22—Reference to third party—Representations by.**

When an owner of a building refers a party wishing to rent it to a third party, as his agent for leasing the property, the owner will be bound by any representation made in connection with the leasing of the property. *Taylor v. Reid*, 2 *P. & B.* 58.

**Agreement made by agent of proprietors of land.**

*See* Agreement 11. *Hersey v. Hatheway*.

**Imposing conditions—Agent cannot impose liability upon plaintiff which defendants had warranted them to be free from.**

*See* Insurance 43. *Bangor Ins. Co. v. McLeod*.

**Party cannot be considered as agent to purchase without express agreement to that effect.**

*See* Trust. *Sutherland v. Meehan*.

**Master of vessel.**

*See* Shipping Law 17. *Burpee v. Carville*.

**Signing note—Personal liability.**

*See* Bills and Notes II. 15.

**Authority when need not be under seal.**

*See* Principal and Surety.

**Service of papers.**

A person authorized by party to serve, is agent for that purpose. *See* Action at Law XI. 16, 17.

**Lease—Execution by direction.**

*See* Evidence IV. 5.

**Repairs of ship—Owner.**

*See* Assumpsit III. 45.

**Negligence of master of ship—Liability of registered owner.**

*See* Shipping Law.

**Master and servant, adoption of acts.**

*See* Assumpsit III. 15.

**Attorney—Presumption of authority to issue execution.**

*See* Attorney V. 4.

**Husband and wife—Implied authority of wife.**

*See* Husband and Wife.

**Agent binding attorney.**

*See* Costs 64.

**Entry on land by permission of agent.**

*See* Trespass II. 34.

**Acknowledgment by agent.**

*See* Evidence I.

**Election law—Agency.**

*See* Election Law.

**PRINCIPAL AND SURETY.****Bond for faithful service of officer—Proof and notice.**

*See* Pleading I. 13.

**Sheriff—Deputy.**

*See* Sheriff.

**1—Bond—Conduct of clerk—Notice.**

By the condition of a bond the obligors agreed to make good to the plaintiffs, a Corporation, any loss sustained by the misconduct of U. as a clerk, within three months after

due proof thereof either by confession of K. or otherwise, and notice or warning thereof in writing given to the obligors. *Held*, That a notice from the solicitor of the company to the obligors, of the general nature of K.'s default, accompanied by an account of entries made by him in the company's books, shewing the moneys received and paid, and a notification that the books were open for the inspection of the obligors, was sufficient proof, and that an affidavit verifying the accounts was unnecessary. *Held* also, That neither the notice nor the solicitor's appointment need be under the seal of the company. *Mechanics' Whale Fishing Company v. Kirby*, 1 All. 223.

### **2—Right of surety to recover—Liability of principal.**

A surety who has been damnified, by giving a security for the original debt which was accepted by the creditor in satisfaction thereof, may recover according to his loss from the principal, upon a declaration stating the circumstances specially, though he has not actually paid the money: as, where he had become liable for the principal on a promissory note, and being sued and unable to pay the amount, gave a bond and mortgage, which the creditor accepted in satisfaction of the note. *Trites v. Kelly*, Trin. T. 1838.

**3—**The principal is liable for the costs of a suit brought against the surety on his original liability; provided he has not unnecessarily incurred expense in defending the suit. *Ibid*.

### **4—Contract under seal—Parol variation.**

B. entered into a contract under seal, to build a house for the plaintiff according to a plan and specification and the defendant became security for the performance of the contract. The plan of the house was changed in some particulars, by verbal agreement between the plaintiff and B. without the defendant's consent. B. failed to perform the contract in respect to parts of the building in which there had been no alteration. *Held*, in an action against the surety, That the contract being under seal, he was not discharged at law by the parol variation of it, though it would have been otherwise if the contract had not been

under seal See *Parker v. Watson*, 8 *Ex.* 404. *Peters v. Bryson*, 6 *All.* 489.

**5—Sheriff's bond—Sureties—Defence.**

The sureties in a Sheriff's bond given under 1 *Rev. Stat.* cap. 181, are not liable for a breach of duty committed by the Sheriff after the 31st March in the year for which they became sureties, though the Sheriff is continued in office after that time. *Berton v. Tierney*, 6 *All.* 202.

6 ————Where the alleged breach of duty by the Sheriff was the not paying over money levied under an execution, the sureties, in an action against them on their bond, may shew that the money was received by the Sheriff after the 31st March in the year for which they became sureties. *Ibid.*

**7—Postmaster—Bond to Crown—Relief of sureties.**

One of the conditions of a Bond given to the Crown by a Deputy Postmaster, required him to give three months notice to the Postmaster General of his intention to resign his office, and to pay all sums of money chargeable against him as Postmaster. At the time of his resignation, a Postmaster was a defaulter, and died insolvent. about twenty-one months after. No proceedings were taken against him to enforce payment, though he was applied to several times, and promised payment, and no notice of his indebtedness was given to his sureties till after his death. *Held*, That his sureties were not entitled to be relieved from the Bond under the 38 *Hen. VIII.* cap. 39, sec. 79. *The Queen v. Hammond and another*, 1 *Han.* 38.

**8—Incorporated Company—Order not warranted by Act or By-laws—Liability on bond.**

An order of the directors of a company not warranted by the Act of Incorporation, or by the by-laws, will not relieve the surety of an officer of the company from his liability on a bond given to the company conditioned among other things that the officer should keep and obey the by-laws; neither would an order or direction of the directors with respect to the funds of the company, unless within the legitimate authority of the board be any justification to the

treasurer, for committing a breach of this bond with reference to the disposition of the funds, by acting in direct violation of the by-laws, or relieve his surety from liability. *Spring Hill Mining Co. v. Sharp*, 3 *Pug.* 603.

**Alteration in contract without consent of surety.**

A surety may be discharged from liability if he has been prejudiced by an alteration without his consent, in a contract for the performance of which he has consented to be bound. *Driscoll v. Barker*, 2 *P. & B.* 407.

**Action against surety—Principal Settling demand—Costs not paid by surety—Judgment entered up for nominal damages.**

*See Blakslee v. Nickerson*, 1 *Kerr* 523.

**Deputy Treasurer—Term of appointment—Liability.**

*See Deputy Treasurer.*

**Alteration of position of surety by subsequent agreement.**

*See Surety.*

**Public Agent—Personal liability—Credit.**

*See Credit.*

**PRIVATE ROAD.**

*See Highway.*

**PRIVILEGE FROM ARREST.**

*See Arrest.*

**PRIVILEGE OF PARLIAMENT,**

*See Arrest.*

**PRIVILEGED COMMUNICATION.**

*See Defamation* 4, 5, 8.

**Attorney and Client.**

*See Evidence* VIII. 23,

**PRIVITY OF ESTATE.**

*See Covenant.*

**PRIVY COUNCIL.**

**Appeal to—Time.**

An appeal to the Queen in Council, under the order of



November 1852, from a judgment of this Court affirming a decree in equity, may be applied for within fourteen days after the minutes of the decree are settled, though more than fourteen days have elapsed since the judgment was pronounced. *Brookfield v. The St. Andrews and Quebec Railway Co.*, 4 All 496.

**Judge's order—Leave to appeal.**

The order of a Judge made in vacation granting leave to appeal to the Queen in Council, and settling the terms on which the appeal will be granted is final, and cannot be revised or rescinded by the Court (Allen J., *dubitante*.) *Domville v. Kevan*, 2 Han. 175.

**Orders in Council.**

See 4 All. page 497, being orders passed 27th November 1852, at the Court at Windsor, and referred to in above case of *Brookfield v. the St. Andrews and Quebec Railway Co.*, and appended to said case.

**Action on order—Necessity of setting out judgment appealed from.**

See Pleading I. 71. *Dow v. Black*.

**PROBATE (COURT.)**

See Executors and Administrators—Surrogate Court.

**PROCEEDINGS (SETTING ASIDE.)**

See Practice VI.

**PROCEDENDO.**

See Practice VI. 46.

**PROCESS.**

See Practice IV.

**Regular on face, a justification to officer.**

See Trespass V. 7.

**PROHIBITION.**

**Prohibition to restrain suit.**

The Supreme Court will grant a prohibition to restrain the Court of Common Pleas from proceeding in an action brought against the Clerk of the Circuits to recover money paid to him as a fine imposed on the plaintiff by a Judge

at *Nisi Prius* for a contempt committed in the *Nisi Prius* Court. *Ex parte Allen*, 2 All. 424.

#### PROMISSORY NOTES.

See Bills and Notes.

#### PROPERTY.

See Delivery.

**Vesting of—Hired men—Claim.**

See Timber 2.

#### PROTEST.

See Bills and Notes—Insurance.

#### PUBLIC AGENTS.

See Principal and Agent—Government officer.

#### PUBLIC OFFICERS.

**Liability—Commissioners of sewers.**

Commissioners of sewers are not liable to actions for work and labor upon the completion of the work, at the suit of persons employed by such commissioners in their public capacity, unless they personally bind themselves to make payment. *Peck v. Robinson*, 2 Kerr 687.

*Prima facie* persons doing work under contracts with commissioners of sewers, are presumed to look to the mode of payment provided by the Act of Assembly 10 and 11 Geo. IV., cap. 29. *Ibid*.

*Quere*, Whether commissioners of sewers would be liable to an action if they neglected to make the assessment required by the Act? *Ibid*.

*Quere*, Whether a supervisor of great roads is personally liable upon contracts made in that capacity. See *Wheeler v. Hayward*, 1 Kerr 657.

**Enforcing contract—With public officers.**

See Mandamus 5.

**Trying right to exercise office.**

See Quo Warranto.

**Clerk of House of Assembly—Liability for contract.**

See Assumpsit III. 48.

**PUIS DARREIN CONTINUANCE.**

*See* Pleading II. 81, 82—Practice VI. 40, 40a.

**PURCHASE.****Agreement to purchase land.**

*See* Tenant at Will.

**For sale and conveyance.**

*See* Tenant for Years.

**PURCHASER.**

*See* Vendor and Purchaser—Sheriff's Sale.

**Consideration.**

*See* Deed.

**Bona fide purchaser of ship.**

*See* Shipping Law 8.

**Of Equity of Redemption by Mortgagee.**

*See* Mortgage 17.

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**QUANTUM MERUIT**

*See* Assumpsit III. d.

**QUARTER MASTER.**

“ Alien.

**QUIET ENJOYMENT****Breach of covenant for.**

*See* Covenant.

**QUO WARRANTO.**

*See* Certiorari—Information.

**Right to hold office.**

Where a person elected a City Councillor has entered upon and is exercising the office, a *quo warranto* is the proper mode of trying his right to it. *Ex parte Cameron*, 1 Han. 306.

**Withholding material facts.**

Where a party applying for a *quo warranto*, improperly withheld material facts, which ought to have been stated in his affidavit, the rule was discharged with costs. *Ex parte Gilbert*, 1 Pug. 281.

**Private corporation—Right of Crown or public not affected.**

An information in the nature of a *quo warranto* will not lie against a person for usurping an office in a private corporation, the rights of the Crown or the public being in no way affected. *Ex parte Gilbert. Re Albert Mining Co., 2 Pug. 29.*

**RAILWAY.****Assessing value of land.**

*See Assessment, Mandamus 6 a.*

**Common Carrier.**

*See Carriers.*

**RAILWAY COMMISSIONERS**

*See Damages—Assessment.*

“ Joint Stock Company.

**RAILWAY COMPANY.****Authority to cut down the level of street—Plaintiff's acquiescence.**

The Act 38 Vic. cap. 39, incorporating the “Carleton Branch Railway Company,” authorised them to locate and construct a railway from deep water in Carleton to the E. & N. American Railway, investing them with all the powers and privileges necessary for the purpose; among others, the right to purchase, take and hold as much land as might be necessary for the location and construction of the railway; provided that in all cases they should pay for the land, taken and used. The 12th section of the Act authorised the company “to run their line of railway through and upon any of the streets, wharves, places or squares,” as also through all unleased lands belonging to the City of St. John. In making the railway, a contractor under the company, cut down a street in Carleton, on which the plaintiff's house fronted, to a depth of about twelve feet, rendering the approach to his house difficult, and materially injuring the value of his property. The plaintiff had been employed as a labourer by the contractor, and worked on a part of the street so cut down. *Held, 1st.* That the 12th section of

the Act gave the company no authority to cut down, or alter, the level of the street; 2nd. That the plaintiff, by having worked on the street, was not estopped from maintaining an action for the injury to his property,—the work having been done by the defendants under a claim of right, and not in consequence of any consent or authority given by the plaintiff. *Wood v. The Carleton Branch Railway Company, Hil. T. 1878.*

**Killing cattle—Liability.**

*See Negligence 4.*

**Running daily train—Duty.**

The fact that there was no profit derived from running a daily train does not constitute one of the “unavoidable causes” that would justify a company in not running a daily train when required by act to do so.

*See Mandamus.*

**Intercolonial Railway—Power to enter on private land.**

The Act 31 Vic. cap. 18 sec. 8, gives no power to persons who have contracted to supply sleepers to be used on the International Railway, to enter on private lands without the owners’ permission, and cut timber for the purpose of supplying such sleepers. *Davidson v. King, 2 Pug. 526.*

**RATE.**

*See Assessment.*

**RATE PAYER.**

*See Bastardy—Vote.*

**RATIFICATION.**

*See Crown Grant I. 18—Principal and Agent—Warrant of Attorney.*

**READINESS AND WILLINGNESS.**

**Averment—Proof.**

*See Pleading I. 27.*

**REAL ESTATE.**

*See Heir at Law.*

**Execution—Testator.**

*See Execution IV. 18.*

**REASONABLE AND PROBABLE CAUSE.**

*See* Malicious Prosecution—Trespass V. 10—Criminal Law I. 8.

**Justice of Peace—Trespass—Want of Jurisdiction.**

The question of reasonable and probable cause can only arise when the Justice has jurisdiction over the matter. *See* Justice of peace IV. 13. *Whittier v. Dibble.*

**REASONABLE TIME.****Dissent—Partition.**

*See* Partition.

**REBUTTING EVIDENCE.**

*See* Evidence.

**RECEIPT.****Application to set aside.**

*See* Practice VI. 40.

Written receipt signed by mortgagee is not admissible in evidence to prove payment of rent to him as against the mortgagor. *Joplin v. Johnston*, 2 Kerr 541.

**Attorney proceeding in action after receipt given—Contesting facts.**

Where a motion was made to set aside the verdict and proceedings for fraud and irregularity, and requiring the plaintiff's attorney to answer, on the grounds that the action had been proceeded in and the verdict obtained after the plaintiff and defendant had settled, and that the plaintiff had given a receipt in full, and had notified his attorney to discontinue the action; and the motion was resisted by affidavits, controverting those in support of the motion, and among other things stating that the costs remained unpaid, as also £14 19s. of the debt, that the defendant had procured the receipt by fraud in making the plaintiff intoxicated, as appeared by two witnesses; and upon these grounds the attorney of the plaintiff, by his directions, had notified the defendant's attorney he would proceed to trial. *Held*, That there was no misconduct imputable to the plaintiff's attorney in proceeding in the action, as the plaintiff had a right to contest the disputed facts before a jury, *Moran v. Gallagher*, 1 All. 24.

**Receipt by Justice of Peace not a recognition of settlement.**

*See* Justice of Peace III. 5.

**RECITAL.**

“ Registry—Crown Grant.

**RECORD.**

“ Pleading II. 23.

**Courts of.**

*See* Justice of the Peace I.

**Debt of record—Foreign judgment not.**

*See* Judgment.

**Evidence.**

*See* Evidence II. 18.

**Variance—Amendment.**

*See* Amendment III.

**Rule of Court not a record.**

*See* Pleading II. 15.

**Entitling.**

*See* Practice XIV. 12.

**Highway—Record of—Necessary statement.**

*See* Highway 18, 81.

**Clerk of peace not bound to produce records of session.**

*See* Justice of Peace III. 8.

**RECOGNIZANCE.**

*See* Bastardy.

Irregular to make and file a recognizance roll until special bail piece be on file to warrant it. *O'Connor v. Mott*, 2 *Kerr* 509.

**Recognizance for prosecution of election petition not a record.**

A recognizance entered into for the prosecution of an election petition before the House of Assembly, under the Rev. Stat. cap. 98, and certified to the Supreme Court by the Speaker as forfeited, is not a record; and in *scire facias* on such a recognizance with an averment *prout patet per recordum*, to which the defendant pleaded *nul tiel record*

the production of the recognizance so certified from the files of the Court does not prove the issue. *The Queen v. Sparrow et al.*, 1 *Han.* 289.

**Interest on judgment against principal, not allowed in entering up judgment on recognizance of bail.**

*See* Bail 88.

**RECOGNIZANCE ESTREAT.**

**Relief.**

*See* Supreme Court.

**Application for relief—Excuse.**

Application to be relieved from a recognizance to appear and give evidence on a prosecution for felony refused—the only excuse for non-attendance being, that the party was in ill health, and expected to be sent for by the Crown officer. *Reg. v. Gerow*, 5 *All.* 688.

**RECTOR.**

*See* Church of England—Trespass I. 8.

**Re-entry.**

*See* Attachment 54. *Doe d. Cogswell v. Smith.*

**REFEREES.**

**Settlement of accounts by—Agents.**

*See* Principal and Agent 13.

**REFERENCE.**

*See* Arbitration.

**REFUSAL TO ADMINISTER OATH.**

*See* Mandamus 13.

**REGISTRY.**

**Non-registry of Nova Scotia grant.**

*See* Crown Grant I. 16.

**Of deed—Avoidance of lease.**

*See* Landlord and Tenant VI. 1.

**Unregistered ship.**

*See* Shipping Law 6.

**Mortgagee in fee.**

Estate cannot pass without enrolment or registry. *See Doe d. Burnham v. Watts*, 2 *Kerr* 441.



**Registry and acknowledgment without delivery.**

*See Evidence II. 9.*

**Certificate of acknowledgment without registry.**

*See Evidence II. 11.*

**Of mortgage, not notice of incumbrance to subsequent purchaser.**

*See Doe v. Power 1 All. 271.*

**Unregistered conveyance, operating as release.**

*See Deed I. 20.*

**Memorial of judgment registered evidence of an incumbrance on land.**

*Scott v. Garnett, 2 All. 624.*

**Registry of deed without previous proof—Operation.**

*See Deed I. 22.*

**Deeds on same sheet—Registry book admitted in evidence.**

*See Deed I. 23.*

**Registry of deed before lease—Operation.**

*See Deed V. 12.*

**Registry Book best evidence of registry.**

*See Deed V. 13.*

**Subpoena to prove registry.**

*See General Rules 126.*

**Registry under Medical Act.**

*See Pleading I. 56.*

**Affidavit of witnesses under 26 Geo. III. sec. 6—Insufficiency of proof to entitle to registry.**

*See Deed I. 46.*

**Administrators deed under license to sell.**

A deed from an administrator under license to sell for payment of debts, held good against a *bona fide* purchaser from the heir, though the deed of the latter was first registered. *See License 12. Doe dem. Bowen v. Robertson.*

**REGISTERED OWNER.****Liability.**

*See Assumpsit III. 45.*

**REGISTRAR.**

See Judicial Notice.

**BEGULATIONS.**

See Statute.

**RELATION.****1—Conveyance—Registry—Delivery of deed.**

A conveyance of land, registered under the Act 26 Geo. III. cap. 3, conveys the estate, by relation, from the time of the delivery of the deed, unless in the mean time another conveyance has obtained priority. *Doe dem. Bridges v. Quant, East. T.* 1828.

**2—Judgment—Signing—Intermediate Conveyance.**

The title conveyed by a Sheriff's deed, to land sold under an execution issued upon a judgment recovered in an action brought on a former judgment in the same Court does not relate back to the time of signing the first judgment, so as to defeat a conveyance made by the judgment debtor between the times of signing the first and second judgments. *Doe dem. Peabody v. McKnight, Ber.* 376.

**3—Registry before proof.**

A conveyance of land, appearing by the certificate indorsed, to have been registered before it was proved by the subscribing witness, does not operate as a registered deed by relation from the time of the proof. *Doe dem. Blair v. Rideout, 3 All.* 502.

**4—Grantor and grantee—Delivery of Deed—Third party.**

As between the grantor and grantee, the registry of the deed transfers the title and possession by relation from the delivery of the deed, but it will not affect the intermediate rights of third parties, not privy to the deed. *Patterson v. Tingley, 5 All.* 558.

**5—Possession—Subsequent registry.**

In trespass *qu. cl. fregit*, for cutting grass on the 31st July, the plaintiff proved possession only; the defendant justified as owner of the land, under a deed dated the 15th July, but not registered till the 1st August. *Held, That as*

against the plaintiff, the defendant had not title by relation from the date of the deed. *Ibid*.

**6—Execution—Memorial—Registry.**

A judgment was recovered against C. and a memorial thereof registered in January 1863; in April 1863, land was conveyed to C., which he conveyed to the defendant on the same day; in 1865, an execution was issued on the judgment against C., under which the land so conveyed to him, was levied on and sold by the Sheriff. *Held*, That the execution had relation back to the registry of the memorial, and defeated the conveyance to the defendant. *Doe dem Solomon v. Graham. Doe dem. Kerr v. Jamieson, Trin. T. 1871.*

**Trespass—Possession—Subsequent deed.**

*See* Trespass II. 15.

*Quære*, Whether, where a bill of sale is registered before an assignment in insolvency by the grantor it relates back to its delivery. *See* Insolvent Act 11. *Pugsley v. Hegan.*

*Quære*, Whether registry of a deed does not so relate back to the date of delivery as to prevent acts and declarations of the grantor after delivery but before registry, from binding the grantee. *See* Evidence I. 27. *Philips v. Trueman.*

**RELATIONSHIP.**

*See* Judge.

**RELEASE.**

**Fraud—Setting aside.**

*See* Practice VI. 40.¶

**Action by executor—Release by parties beneficially interested—Discharge of debtor.**

*See* Discharge 1.

**Pleading Plea Darrein Continuance—Setting aside.**

*See* Practice VI. 40, 40 a.

**Release pleaded—Application to set aside plea and release.**

*See* Practice VI. 40.

**Release by husband.**

*See Husband and Wife—Bills and Notes V. 23.*

**Release executed pending trial of cause must be pleaded.**

*See Pleading II. 32 C.*

**Release by partner.**

*See New Trial III. 34.*

**Authority of partner.**

*See Partnership 8.*

**Latent ambiguity—Evidence—Intention.**

In an action on a promissory note for \$85, given by the defendant to plaintiff's testator, the defendant relied on a release given to him by the testator, of the same date as the note, and one of the considerations mentioned in the release was a sum of \$85. The note had been given for money in the defendant's hands belonging to the testator, after allowing defendant a certain sum for collecting. *Held*, That the circumstances created a latent ambiguity in the release, and that evidence was therefore admissible to shew whether the note was intended to be released or not. *Caldwell v. Keith*, 5 All. 590.

**REMANET.**

*See Judgment as in Case of Non-suit 1, 2, 4, 5.*

A cause can only be made a remanet by order of the Judge at *nisi prius*. *Shepherd v. Hallet*, 1 Han. 43.

**REMAINDER.**

*See Deed I. 25. Will 11.*

“ Half Blood.

**Real estate in remainder may be taken in execution.**

*See Doe v. Hazen*, 3 All. 87.

**Trust—Termination of—Testator's children.**

A testator after directing that so much of his estate as was necessary, should be sold for payment of his debts, devised all the residue of his estate to his executors, in trust to hold for the separate use and benefit of his wife during her life or widowhood, and to pay her the income thereof;

and after her death or marriage, then to be divided among the testator's children. *Held*, that the purposes of the trust did not require the estate of the executors to extend beyond the life of the widow; that at her death their estate terminated, and the testator's children took the estate in remainder. *Doe v. Driscoll*, 4 All. 176.

#### **REMAINDERMAN.**

The tenant of a devisee for life may, after the death of such devisee, be ousted by the remainderman without any notice to quit. *Doe d. Fields v. McKay*, 2 Kerr 435.

#### **Setting up adverse possession against.**

*See* Ejectment I. 3.

#### **REMEDY.**

*See* Action at Law.

#### **Suspension of—Taking security.**

*See* Judgment I. 2.

#### **REMOVAL OF CAUSE.**

*See* Attorney General.

#### **RENDER.**

*See* Bail—Exoneretur.

#### **RENEWAL**

*See* Covenant 8—Landlord and Tenant I. 3.

#### **RENT.**

*See* Landlord and Tenant.

#### **REPAIRS OF VESSEL.**

#### **Detention—Deviation.**

*See* Insurance 34.

#### **Liability for.**

*See* Shipping Law.

#### **REPLEADER.**

*See* Error (Writ of).

#### **REPLEVIN.**

#### **1—Action—Owner of land—Timber cut.**

Replevin lies by the owner of land, for timber cut upon, and taken away from it; and the proceedings will not be

set aside, although the party taking the timber claims title to the land on which it was cut; and, *Seemle*, That replevin can be maintained whenever trespass will lie for taking chattels. *Lyons v. Goram, Mich. T. 1881.*

**2—Actual or constructive taker.**

If replevin is brought against one, who is not actively or constructively the *taker* of the goods, the writ will be set aside. (But see 1 Rev. Stat. cap. 126, sec. 9.) *Groves v. Griffith, Trin. T. 1883.*

**3—Possession of goods.**

The goods mentioned in a writ of replevin cannot be taken by the Sheriff unless they are in the possession of the defendant named in the writ. *Wiggins v. Garrison, Ber. 17.*

**4—Issues—Separate findings—Postea.**

In replevin, where some of the issues are found for the plaintiff, and others for the defendant, each party is entitled to the costs of the issues found in his favor. The *postea* was ordered to be given to the plaintiff for a certain time to enter the judgment; and in case of his neglecting to do so, then to the defendants for the like purpose. *Dickenson v. Ketchum, Ber. 68.*

**5—Outstanding mortgage—Answer.**

Though in replevin both parties are actors, the plaintiff is not prevented by 1 Rev. Stat. cap. 112, sec. 17, from setting up an outstanding mortgage given by the person under whom the defendant claims, in answer to a plea of property in the land on which the grass replevied was cut. *Baxter v. Johnson. 5 All. 350.*

Where the mortgagor is in possession, and the mortgagee has not given any notice of intention to take the rents and profits of the land, grass growing on the land will be deemed to belong to the mortgagor with the assent of the mortgagee. Therefore in replevin for the grass where the defendant pleaded property in it in himself and the plaintiff as tenants in common; on which the plaintiff took issue, an outstanding mortgagee of the land on which the grass was cut, is not available to disprove the plea. *Ibid.*

**Amending verdict—Merits.**

Where in replevin the defendant was entitled to a verdict on the merits on one of the issues, but the jury found for him on an issue which should have been found for the plaintiff, the Court refused a new trial, giving the plaintiff leave to amend the verdict by entering it on the issue on which it should have been found for the defendant. *Ibid.*

**6—Damages—Counsel fees**

The plaintiff in replevin cannot recover as a part of his damages an amount paid to the counsel attending on the execution of a writ *de proprietate probanda*, issued on a claim put in by the defendant; the payment of counsel fees being deemed voluntary. *Davis v. Cushing*, 5 All 383.

**7—Pleading—Waiver.**

Defendant in replevin pleaded *non cepit*, and gave notice that the goods were the property of A., no objection was made that this defence was not pleaded, as required by the Act 18 Vic. cap. 32, and both parties went into evidence of property. On verdict for the defendant—*Held*, That the plaintiff had a right to waive the pleading of the defence; and not having taken the objection at the trial, the Court refused to set aside the verdict. *Wilbur v. Trites*, 5 All 683.

**8—Issue of writ de proprietate probanda—Regularity.**

A writ of replevin was returned by the Sheriff to the plaintiff's attorney with a claim of property; the attorney's clerk, in his absence, issued a writ *de proprietate probanda*. The attorney gave notice to the Sheriff that this writ was issued without his authority, and that he should not proceed on it, but the Sheriff, notwithstanding, held the inquisition. *Held*, on an application to set aside the inquisition, that the writ *de proprietate probanda* was rightly issued, and if the plaintiff was not prepared for the trial of the inquisition, he should have applied to the Sheriff to postpone it. *Jones v. Caie*, 5 All 688.

**9—Pleading—Special Property.**

In replevin for a pair oxen, defendant pleaded—1st. Property in himself; 2nd. Property in A. Plaintiff re-

plied that the oxen were not the property of A., but of himself. Before the taking, the plaintiff had mortgaged the oxen to A., who agreed that he should keep possession of them till the mortgage was due. *Held*, That the special property of the plaintiff was sufficient to maintain replevin; and that the replication did not necessarily mean that the plaintiff had the absolute property. *Elston v. Vance*. 5 All 684.

10 ——— In replevin for a vessel, defendant pleaded— 1st. Property in himself; 2nd. Property in D.; 3rd. Property in B. The defendant and D. each swore that he was not the owner of the vessel. D. endeavored to shew that it was the defendant's property; and the defendant swore that it belonged to B., who was not called as a witness. The Judge directed the jury that the plaintiff was entitled to recover, unless the defendant had satisfied them that the property was in one of the persons named in the pleas. The jury having found for the plaintiff, the Court refused a new trial, though the plaintiff had no title. *Clarke v. Carey*, 6 All 187.

11 ——— Defendant in replevin pleaded property in himself. He had assigned all his property to trustees for the benefit of his creditors, but kept possession of the goods in question, and the trustees did not know of their existence. *Held*, That the general property in the goods passed to the trustees; and, as there was no plea of property in them, the plaintiff was entitled to recover. *McIntosh v. Hastings*, 6 All 284.

## 12—Pleading—Proof.

In replevin, the defendant pleaded property in himself, and P., (without any plea of *non cepit*.) The property was owned by the plaintiff and P. as tenants in common, and the defendant held under P. *Held*, That the plea was not proved; that, to entitle the defendant to a verdict, it must be shewn that there was no property in the plaintiff. *Godard v. Tuck*, 6 All. 370.

An application at the trial to add a plea alleging that the plaintiff and P. were tenants in common of the goods,



and that the defendant at the time of the replevin held the goods for and on behalf of P., was refused. *Held*, That the refusal was right ; and that the Judge had no power to compel the plaintiff to reply to the plea at the trial. *Ibid*.

### 13—Damages.

Substantial damages may be recovered in replevin, though no special damages is alleged in the declaration. Per N. Parker, J., That special damage must be alleged. *Firth v. Fitzpatrick*, 6 All. 348.

### 14—Pleading—Issue.

Lumber, seized as having been cut without license, was replevied out of the possession of the seizing officer within fourteen days ; he appeared to the action, and pleaded—1. Property in the Crown ; 2nd. That the lumber was lawfully in his possession by the seizure. *Held*. That he could not, on the trial of the issues, raise the question whether replevin would lie for lumber so seized ; and that unless the pleas were proved, the plaintiff must recover. Also that the burthen of proving the property to be in the Crown was on the defendant as in ordinary cases of replevin. *Desbrisay v. Little*, 6 All. 392.

If replevin is improperly used, an application should be made to set aside the writ. *Ibid*.

### 15—Proceedings—Trespasser ab initio.

Defendant, an officer appointed by the Canadian Government for the protection of the fisheries, seized a vessel belonging to the plaintiff in the harbour of Gaspe, in the Province of Quebec, on the 18th August, for an alleged breach of the Act relating to fishing by foreign vessels, (31 Vic. cap. 61) and on the 22nd August brought the vessel to the port of Shediac, in the Province of New Brunswick, but did not deliver her to the collector of customs there. The Act directed, that vessels seized, should be “ forthwith delivered to the collector, or other principal officer of the customs at the port nearest the place where seized.” There was a collector of customs at Gaspe, and at several other ports nearer than Shediac. No proceedings having been

taken towards the condemnation of the vessel, the plaintiff replevied her on the 5th September. *Held*, per Ritchie, C. J., Allen and Weldon, J. J., That by taking the vessel to Shediak, and retaining her there in his own possession, the defendant became a trespasser *ab initio*, and that replevin would lie. Per Fisher and Wetmore, J. J., That by the seizure, the vessel was in the custody of the law, and therefore replevin would not lie. *McGowan v. Betts*, *East T.* 1871.

**16—Setting aside writ—Summary motion.**

The Court will not set aside a writ of replevin, on a summary motion unless in a clear case. Where there was some proof of property and possession in the plaintiff, and to connect the defendant with the taking, the Court refused to interfere. *Cliff v. Gunter*, 2 *Kerr* 498.

**17—Termination of suit—Assignment of bond.**

Where on a writ *de proprietate probanda*, the finding is for the defendant, the replevin suit is terminated, and the replevin bond cannot be assigned to the defendant. *Pollock v. Gardner*, 2 *Kerr* 655.

**18—Plea—Non cepit.**

In replevin on the plea of *non cepit* proof that the defendant had the goods at the place alleged is sufficient to entitle the plaintiff to recover. *McLeod v. McMillan*, 3 *Kerr* 64.

**19—Pleading—Mistake—Leave to withdraw plea.**

A defendant in replevin, claiming the goods under a sale and delivery from A. an alleged partner of the plaintiff, pleaded by mistake, that at the time of the taking, the plaintiff had no property in the goods except jointly with A.; leave was given to withdraw the plea and plead property in himself, on payment of the costs occasioned by his mistake: the Court rejecting a motion made on behalf of the plaintiff for leave to discontinue the replevin suit without payment of costs, and to order the replevin bond to be cancelled. *Rourke v. Keogh*, 1 *All.* 370.

**20—Plaintiff's right—Property—Mixture.**

The plaintiff being the licensee of Crown land, agreed

to allow A. to cut logs thereon to be manufactured into deals, and to furnish him supplies to carry on his lumbering, which were to be paid for in deals of a specified quality, delivered to the plaintiff at Richibucto. *Held*, (Street, J. *dissentiente*,) That no property in the deals when cut, vested in A. until it was ascertained what portion of them came within the description the plaintiff was to retain, and therefore that the plaintiff might replevy the whole of the deals from the defendant. to whom A. had delivered them before they arrived at Richibucto. *Held* also, That the defendant having mixed with these deals others belonging to himself, which he refused to point out and which could not otherwise be distinguished, did not deprive the plaintiff of his right to replevy. *Des Brisay v. Mooney*, 2 *All.* 53.

*Held*, per Street, J., That under the agreement, the property in the lumber was in A. until delivered to the plaintiff, and that the Judge ought so to have directed the jury; and that the plaintiff was not entitled under the circumstances to replevy the lumber from the defendant. *Des Brisay v. Mooney*, 2 *All.* 53.

**31—Breach of bond—Claim of goods—Name.**

If a defendant in replevin claims property in part of the goods replevied, and the property is found in him on an inquisition under a writ *de proprietate probanda*, this constitutes a breach of the replevin bond, and entitles the defendant to an assignment of it, in order to recover the costs of the proceeding. *Berry v. Mitchell*, 2 *All.* 380.

*Quere*, as to the disposition by the Sheriff of the goods not claimed by the defendant. *Ibid.*

Property replevied was claimed by the defendant in the name of "Barry" instead of "Berry;" the property was found to be in the claimant, and the bond was assigned to him by his proper name. *Held*, That the mistake was immaterial. *Ibid.*

**32—Pleading—Evidence under plea non cepit.**

Whatever might formerly have been pleaded to an avowry, may, since the Rev. Stat. cap. 126, be given in evidence at the trial in answer to the defence under the plea of *non cepit*. *Myers v. Smith*, 4 *All.* 207.

The defendant in replevin is entitled to damages on a verdict in his favor on the plea of *non cepit*, if he gives such evidence as would have supported an avowry under the former law. *Ibid.*

**23—Onus probandi.**

When a defendant in replevin pleads property in himself or a third person, and issue is taken thereon, the *onus* of proving property is on the defendant, and if he fails in doing so, the plaintiff is entitled to recover. *Graham v. Wetmore*, 4 All. 373.

**24**——Defendant in replevin pleaded property in M., and a seizure as Sheriff under execution against M. Replication—property in the plaintiff. On the trial the defendant failed to prove property in M., and a verdict was given for the plaintiff. *Held*, That the defendant was bound to prove the whole plea, and was not entitled to judgment *non obstante veredicto*, on the ground that the replication had admitted that the property was in custody of the law and therefore not repleviable. *Graham v. Wetmore*, 4 All. 377.

**Crown cannot maintain replevin under Act 13 Vic. cap. 53.**

*See Reg. v. McMahon*, 3 All 125.

**25—Damages—Jury not bound to give.**

If in action of replevin, the jury find for defendant, on the plea of property, they are not bound to give him damages, under 1 Rev. Stat. cap 126, sec. 16. *Fearon v. Murray*, 5 All 11.

**26—The Jury not finding on several issues.**

It is no ground for a new trial in replevin, that the jury have not distinctly found on the several issues,—it being understood that the substantial question was, to whom the property in dispute belonged ; and that the Court might enter the verdict on the several issues, accordingly. *Ibid.*

**27—Goods not replevied—Declaration—Evidence—Damages.**

A declaration in replevin charged defendant with taking

and detaining 500 pieces of deals, 20 futtocks, and 20 ship-knees, on the 1st September 1867. Plea—as to all except 314 pieces of the deals—*non cepit*; and as to them—property in defendant. Under the writ of replevin, the Sheriff took a railway car load of deals, containing 314 pieces. The plaintiff claimed 84 pieces as having been taken from him by the defendant, but only gave evidence of 18 pieces in the load, as being his property. No futtocks or knees were found or replevied—they having been taken by the defendant in 1865. It was doubtful, under the evidence, whether the Sheriff had delivered to the plaintiff the 84 pieces of deals, or only 18 pieces; and also, what had become of the remainder of the load. Verdict for the plaintiff for the value of the futtocks or knees; and for the defendant, on the plea of property, for the value of the load of deals. *Held*—1st. That the futtocks or knees, not having been replevied, ought not to have been included in the declaration, and that the plaintiff could not recover for them; 2nd. That the defendant had a right to shew at the trial, that the futtocks, etc., had not been replevied; 3rd. That the defendant was only entitled to damages for the value of the deals replevied and delivered by the Sheriff to the plaintiff, and not for the whole load; and that it should have been left to the jury to determine what portion of them was so delivered. *Steeves v. Wilson*, 1 *Pug.* 185.

**28—Identification of property—Writ—Evidence.**

It is not necessary to put the writ in evidence for the purpose of identifying the property seized with that described in the declaration. *Davidson v. King*, 3 *Pug.* 396.

**29—Damages.**

Where defendant cut lumber on plaintiff's land without his permission, and replevin was brought under which plaintiff got possession of the timber cut. *Held*, That he was also entitled to recover substantial damages beyond the actual loss sustained, if the jury choose to allow them. *Ibid.*

**30—Expenses taking care of goods—Damages on a first taking—Complaint only as to last taking.**

Expenses paid to the Sheriff in connection with the

safe keeping of property replevied are recoverable as damages.

In replevin, where the plaintiff complains only of the last taking, he cannot recover as he might in trespass, for damages consequent on a first taking, even when the first was illegal, or the defendant's subsequent conduct was such as would make him a trespasser *ab initio*. *McGowan v. Betts*, 2 *Pug.* 90.

**31—Notice of action—Fisheries Act 31 Vic. cap. 61.**

The section of the Act 31 Vic. cap. 61, (Canada Act) requiring notice of action does not apply to replevin, and a plea of want of notice could neither avail as a bar to the action nor to affect the action. *Ibid.*

**32—Plea non cepit—Verdict upon.**

In replevin where the defendant pleads *non cepit* or *cepit in alio loco* the plaintiff must have a verdict if he prove that the defendant had the goods in the place mentioned in the declaration, although the first taking was in another place. *Ibid.*

**33—Counsel fees—Boomage—Damages.**

The plaintiff in replevin cannot recover as part of his damages an amount paid to counsel attending on the execution of a writ *de pro. pro.* issued on a claim put in by defendant; nor a sum paid for boomage where the timber replevied was in charge of a boom company, where it was placed for safe keeping, that being a charge, which he as owner, would be liable for at all events. *Davis v. Cushing*, 5 *All.* 642. *Davis v. Cushing*, 5 *All.* 383.

**34—Pleading—Onus of proof.**

Lumber was replevied out of the possession of the defendant who appeared to the action and pleaded, 1st. *Non cepit*. 2nd. Property in the defendant. 3rd. property in W. E., and 4th. property in the Crown. *Held*, 1st. That the plea of *non cepit* only put in issue the taking, and it was sufficient for the plaintiff to entitle him to recover, to prove that the defendant had the goods in the place in which, etc., and that the onus of proving property out of the plaintiff was on the defendant; and 2nd. That this was equally the

case where there was a plea of property in the Crown. *Ogden v. Bourgeois*, 2 *Pug.* 365.

**35—Delay in issuing writ de prop. prob. —Order of Judge—Several claims—Party entitled to claim.**

Under a writ of replevin issued against defendant, the Sheriff seized two rafts of logs in the possession of H., and one in the possession of S. Separate claims of property were put in to the whole of the logs by H., S. and M., respectively. Plaintiff did not issue a writ *de prop. prob.*; and after a considerable time had elapsed, H. and S. obtained a summons from a Judge calling on plaintiff to shew cause why the Sheriff should not restore to them the logs taken out of their possession under the writ. On the return of the summons the Judge made an order for the Sheriff to restore the property to H. and S. on the ground that plaintiff had shewn no cause to justify the delay in issuing the writ *de prop. prob.* *Held*, per Allen, C. J., and Wetmore and Duff, J. J., Weldon, J., *dissentiente*, That this order could not properly be made, at least without giving M., the other claimant, an opportunity of being heard.

*Quære.* Whether several claims can be put into property replevied?—Whether any person but the one out of whose possession the goods were taken by the Sheriff can put in a claim to the property? *Ellis, Assignee, et al., v. Marooney*, 1 *P. & B.* 7.

**36—Discontinuing action—Finding of jury in favour of claimant—Trover subsequently brought.**

In an action of replevin the defendant put in a claim of property, and plaintiff issued the writ *de prop. prob.*, on which the Sheriff's jury found the property in the claimant. Plaintiff thereupon discontinued, and brought trover against the defendant in the replevin suit, and another person. It was objected that plaintiff could not recover, as he was bound to proceed in the action of replevin; but, *Held*, 1st. That the finding of the Sheriff's jury in favor of defendant did not divest plaintiff of his property in the logs, but simply determined the right to the possession, and was not conclu-

sive as to the property. 2nd. (per Allen, C. J., and Welton and Fisher, J. J., Wetmore, J., *dissentiente*), That though by the Rev. Stat. cap. 126, he might have proceeded with the replevin suit, and declared in such form as he chose, the Act did not take away his common law right to bring trover for the conversion of his property after the inquisition. *Gibson v. McKean and Randolph*, 8 Pug. 299.

**27—Several claimants—Sheriff's return—Signing of claim by attorney of claimant.**

In a replevin suit, where the Sheriff returned the writ, with an endorsement that three persons (naming them) claimed property in the goods replevied, an application was made to the Court, based on affidavits, shewing that separate claims had been put in by the parties named, and the Court was asked to set aside all except the first claim filed, but as the Sheriff's return shewed only one (a joint) claim, and he had not asked to amend his return, the application was refused—no opinion being expressed upon the point as to whether several claims of property can be received by the Sheriff, or whether, as soon as one claim is filed with him, he is bound to return the writ.

*Semble*, That a claim of property signed by the attorney of the claimant is sufficient. *Ellis, Assignee, &c. v. Morooney*, 3 Pug. 542.

**28—Pleading—Estoppel—Representation.**

In replevin, plaintiff may shew, the same as he might in trover—that defendant by his acts is estopped from denying that the property in question is the plaintiff's, and if the alleged estoppel is *in pais*, it may be relied on in evidence without being pleaded. A mere representation of a fact will not amount to an estoppel unless it was made with the intention of inducing another party to act upon it, and he does act upon it and alter his position. *Hegan v. Fredericton Boom Co.*, 2 P. & B. 165.

**29—Verdict for portion of property—Finding of jury for part.**

Plaintiff declared for the alleged unlawful taking by defendant of 600 logs; but the jury only found the plain-



tiff entitled to 450. *Held*, That the plaintiff's cause of action as to 150 logs being answered, defendant was entitled to a verdict for that portion under sec. 72 of the Common Law Procedure Act, 1875. *Hanington v. Cormier*, 3 *Pug.* 212.

**40—Replevy of goods taken on execution—Claim of property.**

Where plaintiff replevied from defendant goods which the latter had levied under an execution for taxes issued against plaintiff, and defendant put in a claim of special property, upon which a writ of *de prop. prob.* issued, and the Sheriff's jury found the special property in the claimant under the execution, the Court set aside the inquisition, holding that the claim of property and writ *de prop. prob.* were not applicable to such a case. *Renaud v. Keswick*, 1 *P. & B.* 8.

**41—Claim of property—Party entitled to claim.**

Plaintiff as assignee of the estate of an insolvent, replevied certain goods, *Held*, that while the sheriff still had possession of the property, and before its delivery to the sheriff, sec. 125 of the Insolvent Act would not prevent a claim of property being put in under the Replevin Act.

No person but the defendant (the person out of whose possession the goods have been taken) can put in a claim of property in replevin. *Vanwart, Assignee &c., v. Shepherd*, 2 *P. & B.* 225.

**Third party claiming property—Effect of assignment of Bond and recovery.**

See Bond C. 28. *Wheeler v. Stewart*.

**42—Property not repleviable—Practice.**

Where defendant in replevin wishes to raise the question that the property replevied was in custody of the law and therefore not repleviable he should apply to set aside the writ instead of pleading it as a defence. *Hanington v. Girouard*, 3 *Pug.* 151.

**43—Insufficiency of plea.**

Where in a declaration in replevin plaintiff alleged that

the defendant took and unjustly detained plaintiff's property, it is no answer for defendant to plead that the goods were in possession of C. and that defendant took them under an execution against him; or under an attachment issued under the Insolvent Act. Such a plea neither traversing, nor confessing and avoiding the plaintiff's allegation. *Ibid.*

*Semble*, that the finding of a jury under a writ *de prop prob.* in favor of the claimant is not conclusive, and plaintiff may issue second writ. *Ib.*

**Costs—Inserting unnecessary counts, costs not allowed.**

*See costs 120. Ib.*

**44—Pleading with party as Owner and not as plaintiff's agent.**

Defendant purchased lumber from D., who claimed to be the owner. In replevin by the plaintiff, who owned the lumber, the defendant cannot set up as a defence that D. had authority from the plaintiff to sell the lumber for a certain price; the defendant in purchasing having dealt with D. as the owner of the lumber, and not as the plaintiff's agent. *Davis v. Cushing*, 5 All. 383.

**45—Right to begin—Setting aside inquisition.**

On the trial of a claim of property in replevin under writ *de pro. pro.*, the claimant is the person entitled to begin.

The Court has power to set aside an inquisition in replevin, found under a writ *de pro. pro.* *Bailey v. McDuffee*, 2 P. & B. 26.

**46—Onus of proof.**

Onus of proving property as stated in the pleas is on the defendant, and he is bound to begin. *Graham v. Wetmore*, 4 All. 373.

**47—Wrongful taking—Traverse of, necessary.**

In replevin a plea alleging that at the time of issuing and service of the writ the goods were not in defendant's possession, without traversing the wrongful taking, is bad. *Davidson v. King*, 2 Pug. 526.

**48—Distress for rent—Claim by landlord.**

The 1 Rev. Stat. cap. 126, sec. 12, allowing claims of property to be put in in an action of replevin, is not applicable to cases of distress for rent. *See Distress. Rourke v. Parks.*

**49—Motion to set aside writ—Matter of defence should be pleaded.**

The defendants being Government contractors for constructing a portion of the Intercolonial Railway, employed sub-contractors to cut railway sleepers for them. The sub-contractors went on plaintiff's land without his permission and cut timber for the defendants. An action of replevin being brought the defendants moved to set aside the writ on the following grounds: 1st. Defendants had right as Government contractors to cut timber anywhere for railway purposes. 2nd Misnomer of one of the defendants. 3rd. Defendants not the proper persons to be served, not being in possession. *Held*, That the 1st and 3rd objections would be defences to be set up by plea, and that the writ could not be set aside on these grounds. *Held*, also, That a defendant may be sued under a name he is commonly known by, though it is not his proper name. *Davidson v. King*, 2 *Pug.* 5.

**50—Sheriff's jury.—County Court.**

In replevin in the County Court seven is the proper number of jurymen under a writ *de pro. pro.* *Gregory v. McQuade*, 3 *Pug.* 1. (*See now Consol. Stat. cap. 45. sec. 15.*)

**Service of writ by Sheriff—Interest as Inspector of estate—Writ set aside.**

*See Sheriff 31. Fairweather v. Nevins.*

**Non tenuit—Fraud may be given in evidence under plea of.**

*See Landlord and Tenant VII. 7 McLeod v. McQuick.*

**Excessive finding of jury—New trial ordered unless plaintiff consents to reduce verdict—Party cannot fix damages himself—Right to have verdict for nominal damages—Postea.**

*See Practice VI. 52. Steeves v. Wilson.*

**Application to add plea on trial—Judge has no power to compel plaintiff to reply at trial.**

*See Supra 12.*

**Delivery of goods—Bill of lading—Possession—Plea—Replication.**

*See Pleading II. 28.*

**Pawnee may maintain replevin against pawnor.**

*See Bailee*

**Former recovery—Evidence in former action.**

*See Evidence III. 17.*

**Justice's Court—Removal of proceedings in replevin not by review, but by certiorari.**

*See Bustin v. Howell, 1 All. 596.*

**Cattle impounded—Justice may grant replevin for.**

*See Justice of the Peace II. 11.*

**Costs.**

*See Costs VI, 101, 102.*

Replevin will not lie for liquors seized under a warrant issued by a Justice of the peace under the prohibitory liquor law 18 Vic. cap. 36. *Breeze v. Stockford, 3 All. 329.*

**Judgment as in case of non-suit not grantable in replevin.**

*McGeehan v. Hale, 3 All. 507.*

**Sheriff—Trial of claim—Sheriff's duty not judicial, and may be performed by Deputy.**

*Crane v. Allison, 4 All. 59.*

#### **REPLEVIN BOND.**

*See Bond I. C.*

#### **REPRESENTATION.**

“ Warranty.

#### **RESERVATION.**

“ Deed—Highway.

#### **RESCINDING CONTRACT.**

“ Action at Law—Statu. Quo.

#### **RESIDUE AND RESIDUARY LEGATEE.**

“ Will.

**RESPONDEAT SUPERIOR.**

*See* Action at Law VI.

**RESTITUTION, WRIT OF.**

“ Landlord and Tenant VII. 5. 6.

—Of goods.

*See* Criminal Law.

**RESTRAINT OF TRADE.**

“ Contract 88.

**Resulting Trust.**

*See* Trust.

**RETAINER.**

“ Attorney.

**RETURN.****Writs -Executions.**

*See* Execution—Practice.

**REVENUE.**

“ Attorney General—Custom Duties—Criminal Law II. 10.

**REVENUE ACT.**

*See* Criminal Law I. 9.

Under the Provincial Revenue Act 3 Vic. cap. 1, rum not being of the proof of twenty-six by the bubble is not liable to the specific duty thereby imposed; the words of the Act being unambiguous, the known intent of the Legislature to impose the duty cannot be regarded. *Hammond v. Robinson*, 2 Kerr 295.

By the Act 11 Vic. cap. 67, “no spirits shall be imported into the Province in casks of less size than to contain one hundred gallons, or in other than decked vessels of not less than thirty tons register; and all spirits imported contrary to the provisions of the Act, or that may be found on board any vessel of less than thirty tons register, in casks of less size than to contain one hundred gallons, within the limits of any port of entry in the Province, shall be seized and forfeited,” etc. *Held*, That spirits in casks less than one hundred gallons were liable to forfeiture,

though the vessel in which they were imported was over thirty tons register. *Attorney General v 20 Casks Spirits*, 2 *All.* 457.

#### REVENUE OFFICER.

*See Criminal Law I. 8.*

#### REVENUE LAWS.

A vessel fraudulently landing goods by means of boats, shall be legally intended to have come into port under the revenue laws. Statutes relating to the revenue are not to be construed as Penal Acts in proceedings against persons for smuggling goods into the Province. *Attorney General v. Patterson, C. Ms.* 16.

#### REVERSIONARY INTEREST.

Plaintiff leased cattle to T. for ten years, at the end of which time T. was to give up the cattle or others in their stead, in as good condition as at the date of the lease. *Held*, That the plaintiff had no absolute reversionary interest in the cattle, and could not maintain an action on the case against the Sheriff for selling them under an execution against T. during the term. *Good v. Winslow*, 4 *All.* 241.

#### REVESTING PROPERTY.

*See Shipping Law 6.*

#### REVIEW.

*See Justice of the Peace II.*

Where the general ground of objection is taken in Court below and yet the true reason, in support of the objection is not advanced, the Counsel on review should not be prevented from urging other reasons and principles. *Kennedy v. Turnbull*, 2 *Pug.* 378.

**Parish Court—Same right of review as in Justice's civil court.**

*Dumphy Ex parte* 1 *P. & B.* 45.

**Portland (Town of) Civil Court.**

*See Portland.*

**Affidavits—Use of.**

On review, before a County Court Judge, of a judgment

obtained in a Justice's Court, several affidavits were produced, in addition to that of the party applying for review, provided for in section 44 of the 1 Rev. Stat., cap. 137, which were necessary to bring before the Judge the grounds relied on for a review. *Held*, on application for a *certiorari* to remove the proceedings on review, (per Allen, C. J., and Weldon and Fisher, J. J.) That the Judge was right in permitting the affidavits to be used, and in allowing for them in the costs of review. But, per Wetmore, J., That the affidavits were improperly used, and that the Judge had no power to look at any papers except the Justice's return and the affidavit provided for in section 44.

*Quære*, Whether the Supreme Court has any control over costs taxed by a Judge of a County Court in a review case *Ex parte Welling*, 3 *Pug.* 218.

#### **Replevin.**

The proceedings in replevin before a Justice of the Peace under the Act 1 Wm. IV, cap. 9, cannot be removed into Supreme Court by an order for review as provided in the Justices' Act 4 Wm. IV, cap. 45. The mode of removal is by *certiorari*. The jurisdiction by review cannot be extended to cases not named in the Act 4 Wm. IV, cap. 45. *Austin v. Howell*, 1 *All.* 596.

#### **Costs where no jurisdiction.**

*See* Costs X, same case.

#### **Party obtaining order for review has the right to begin at the hearing.**

Same case.

#### **Proceedings by review not applicable to Civil Court of Town of Portland.**

*See* Portland (Town of.)

#### **Review of Judge's order.**

*See* Practice V. 5 *a.*

#### **Taxation of costs.**

*See* Costs.

### **REVOCATION.**

*See* Executors and Administrators.

" Arbitration.

**Of provisions in will.**

*See Contract 14.*

**Trustee—Revocation of authority of.**

F. died in the latter part of August, 1870, intestate, having his life insured in the sum of \$6000, "to be paid to E. (the plaintiff) his wife, if she should survive him; if not, to the children of the assured, or their legal representatives." On the 18th September following, plaintiff gave defendant, in writing, authority to collect the insurance and use it for the purpose of paying the debts of her husband. Subsequently, on the 16th September, defendant not being satisfied with the previous authority, procured a deed poll, whereby the plaintiff assigned the policies to him in trust for payment of the remainder to plaintiff. Two creditors were about taking steps to attach the policies in the United States, when being informed by the defendant of the assignment, they, at his request, took no further proceedings. On the 30th March, 1872, and before defendant had paid over any money in pursuance of the deed, plaintiff signed a revocation, and through her solicitor, made a demand from defendant of the amount received on the policies. Notwithstanding this, defendant distributed among the creditors what was necessary to discharge their claims. The plaintiff having sued defendant for the whole sum received from the Insurance Co. *Held*, 1st, That it was competent for plaintiff to revoke the authority given to defendant so long as he had neither parted with the fund or entered into any binding obligation with the parties to whom the money was to be paid. 2nd. That, as there was no debt due from plaintiff to the creditors of her husband, nor any obligation on her part to discharge his indebtedness, the fact of defendant's having communicated to F.'s creditors the authority to receive and pay over the money, would not be sufficient to prevent the plaintiff from changing its disposition by revoking the authority. 3rd. (Per Ritchie, C. J., and Allen and Weldon, J. J., Wetmore, J. *dissentiente*.) That the engagement entered into with the creditors who were about attaching the policies was bind-



ing, and the plaintiff could not recover the amounts paid over to them. *Frost v. Kerr*, 2 *Pug.* 338.

### **RIGHT OF ENTRY.**

*See* Deed I 25—Limitation of Actions.

### **RIGHT OF WAY.**

#### **Presumption of—Lost deed.**

*See* Evidence VI. 12.

#### **Deed—Construction.**

*See* Deed V. 4.

### **RIGHT TO BEGIN**

#### **Replevin.**

*Onus* of proving property as stated in the pleas is on the defendant and he is bound to begin. *Graham v. Wetmore*, 4 *All.* 378.

On trial of claim of property under writ *de pro. pro.*—the claimant is the person entitle to begin.

*See* Replevin 45.

#### **Proceedings on review from Justices' Court.**

*See* Practice XIV. 2.

#### **Riparian proprietor—Rights of.**

A riparian proprietor whose land is bounded by high water mark has the right to an unobstructed access from his land to the navigable waters of the arm of the sea when the tide is up, and though the title to the shore is in the crown, he has the right to the unobstructed access from his land on the shore to the navigable waters of the arm of the sea when the tide is out, and can recover damage from any person who interferes with or injuriously affects that right or the exercise of it. S. erected a smoke house between high and low waters mark, opposite B's land, and near B's store. The smoke and effluvia from the smoke house injured B's goods and interfered with his business. *Held*, That B. had a good cause of action against S. for the injury so inflicted. *Byron v. Stimpson*, 1 *P & B* 697.

### **RIVER.**

#### **Highway—Obstructing—Damage.**

*See* Action on the Case IV.

**Grant bounded by river conveys no title below high water mark.**

*See* Crown Grant I. 18.

**Wharf built on navigable river.**

*See* Action on the Case IV. 8.

**Erection of dam—Right to destroy.**

*See* Water Course.

#### **ROAD.**

“ Highway.

#### **ROAD MASTER.**

“ Credit.

#### **ROYAL INSTRUCTIONS.**

“ Crown Grant III. 2.

#### **RULE FOR BODY.**

“ Practice VIII. 5.

#### **RULE OF COURT.**

Rule of Court not a record. *Watson v. Roberts*, 8 Kerr 509.

**Judge's certificate cannot be made a rule of Court.**

*See* Judge IV. 7.

**Order of nisi prius necessary to make a rule of Court before it can be set aside.**

*See* Nisi Prius.

#### **RULES—PRIVY COUNCIL.**

“ Privy Council.

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#### **SAINT JOHN BRIDGE COMPANY.**

“ Joint Stook Company.

#### **SAINT JOHN (CITY OF).**

Under the Charter of the City of Saint John, the fine imposed upon a person carrying on trade within the city without having been admitted a freeman, is recoverable before the Mayor, though the warrant to levy the fine must be under the common seal of the city. *Regina v. Small*, 1 Kerr 48.

**Judgment by default—Particulars—Proof—Practice.**

*See City Court.*

**Power to make Pilotage Regulations.**

*See Pilotage.*

**Corporation of Saint John—Limiting power to make by-laws—No right to do so.**

*See By-Law 5.*

**Licence to sell fresh meat—Conviction against free-man of city.**

*See By-Law.*

#### SALARY.

**Liability of Committee for salary of preacher.**

*See Credit.*

#### SALE.

**" Sheriff's deed—Vendor and purchaser.**

**Cancelling sale—Revesting of property.**

*See Shipping Law 6.*

**Agreement for sale of stranded ship—No property passing.**

*See Shipping Law 7.*

**Notice of sale by posters and advertisement.**

*See Executors and Administrators V. 2.*

**Plaintiff purchasing at a sale under decree.**

*See Equity 10.*

**Purchasing equity of redemption.**

*See Mortgage 17.*

**Actual Delivery.**

*See Delivery—Contract.*

**Power of sale in Mortgage—Assignment.**

*See Mortgage 13.*

**Sale of Wharfage—Written conditions—Verbal statement by Clerks.**

*See Evidence V. 8.*

**Sale of vessel by joint owners—Joinder in action for share of proceeds.**

*See Action at Law XIII.*

**Sale of Shares.**

See Assessment 19.

**SALVAGE.**

“ Shipping Law.

**SATISFACTION.**

“ Suspension—Accord and Satisfaction.

**Entry of, of Judgment.**

See Sheriff's sale 2.

**Judgment against Sheriff.**

See Trespass III. 5.

**Taking bill of exchange for debt.**

See Bills and Notes V. 29, 80, 81.

“ Judgment I. 1, 2.

**Whether bill or note taken as—A question for the jury.**

See Evidence XII.

**After one judgment satisfied, it is too late to be set-off against another.**

See Set-off 7.

**SCIENTER.**

“ Evidence III. 30.

**SCIRE FACIAS.**

“ Practice IV. 3—9, VI. 48.

Every writ of *scire facias* should state the particular circumstance which entitle the party to the remedy sought to be obtained. Any matter which might have been pleaded in the original action cannot be pleaded to an ordinary *scire facias* under the Statute of Westminster. A party can only have judgment prayed for in his *scire facias*, and such judgment will not be available to give him an execution against a joint debtor not brought into Court in the original action, or under the Act of Assembly 26 Geo. III. sec. 24.

*Semble*, That the pleading to a *scire facias*, under any Act of Assembly, would be governed by the same rules as under the Statute of Westminster. *Johnston v. Tibbits*, Ber. 855.

**SCIENTIFIC WITNESS.**

*See* Witness.

**SCHOOLS.**

“ Parish Schools—Common School Act.

**SCHOOL ASSESSMENT.**

“ Assessment II.

**Compelling assessment to satisfy Judgment.**

*See* Mandamus 18.

**SCHOOL INSPECTOR.**

“ Common School Act.

**SCHOOL TEACHER.**

**Dismissal—Trustees—Inhabitants—Liability.**

A licensed school teacher employed by the inhabitants of a school district, with the assent of the trustees, under the provisions of the Parish School Act, (1 Rev. Stat. cap. 49) can only be dismissed during his term of engagement, by the trustees; and if the inhabitants exclude him from the school, whereby he is prevented from obtaining the provincial allowance under the Act, they are liable in an action on the case. *Connor v. Wiggins*, 5 All. 185.

If the plaintiff had been guilty of misconduct, but was not legally dismissed by the trustees. *Semble*, That he could only recover nominal damages. *Ibid*.

**SECONDARY EVIDENCE.**

*See* Evidence VII.

**SECOND ACTION.**

“ Action at Law VIII.—Former Recovery.

**Staying proceedings in.**

Proceedings in second action for same cause will be stayed until the costs of the first action are paid, where the plaintiff's conduct has been negligent or vexatious. *Estabrooks v. McKenzie*, C. Ms. 41.

**Staying proceedings until payment of costs of previous action.**

*See* Practice VI. 48. Ejectment IV. 5.

Where judgment *quasi* non-suit was signed against

plaintiffs for not proceeding to trial pursuant to notice, and he afterwards brought a second action for the same cause, it appearing that the plaintiff's conduct was not vexatious or negligent, but that he was prevented from proceeding to trial under circumstances which would if shewn to the Court have been sufficient to have prevented the granting of the motion of non-suit, the Court refused an application to stay proceedings in the second action until payment of costs in the former suit. *Wetmore v. Baxter*, 3 *Pug.* 235.

### **SCHOOL TRUSTEES.**

#### **Removal of proceedings.**

*See* Certiorari I. 1.

### **SEA SHORE.**

“ Riparian Proprietor—Limitation of Action—Intrusion.

### **SEAL.**

*See* Corporation—Insurance.

#### **Policy valid without seal.**

*See* Evidence VI. 5.

#### **Solicitor's appointment by Company need not be under seal.**

*See* Principal and Surety 1.

#### **Foreign judgment—Seal of Court—Proof.**

*See* Judgment III.

#### **Letters of administration need not be under particular seal.**

*See* Executors, etc., IV. 2.

#### **License to cut timber—Necessity of seal.**

*See* License 5.

#### **Corporate or private seal on acknowledgement of deed in Great Britain.**

*See* Deed I. 28.

### **SEARCH.**

#### **Eor papers.**

*See* Evidence VII. 15, 16, 17.

#### **—For witness.**

*See* Evidence VII. 22.

**SEARCH WARRANT.**

*See* Justice of the Peace.

**SEA WALLS.**

**Keeping in repair—Liability.**

*See* Corporation 23.

**SEA WORTHINESS.**

“ Insurance.

**SEAMAN'S WAGES.**

**Deviation in voyage—Right to sue—Liability of part owner of vessel for—Jurisdiction of Justice of the Peace.**

*See* Shipping Law 9—Justice of the Peace II. 3.

**Change in ownership of vessel—Liability for wages.**

*See* Shipping Law 15.

**SECOND APPLICATION.**

**Certiorari—Amended affidavits.**

*See* Certiorari III. 13.

**Mandamus.**

*See* Practice V. 17.

**SECURITY.**

**See principal and surety—Satisfaction—Suspension of remedy by taking.**

*See* Judgment I. 2.

**SECURITY FOR COSTS.**

“ Costs.

**SEDUCTION.**

An action cannot be maintained by a father, for the seduction of his daughter while she is hired by the month in the service of another person ; though the father received her wages, and was obliged to maintain her in consequence of her pregnancy. (*Ritchie, J., hesitante.*) *Simpson v. Reed*, 4 All. 52.

**SEPARATE PROPERTY.**

*See* Husband and Wife.

**Servant—Negligence.**

*See* Master and Servant.

**Service of papers, etc.**

*See* Practice IV.

**—By publication.**

*See* Insolvent Act 23.

**SET-OFF.****Reduction—Payment or set-off.**

*See* Costs I. 8.

**1—Agreement to set off—Judgment assigned.**

A party taking an assignment of a judgment after notice that the assignor had agreed with the defendant to set-off the amount against a judgment recovered by the defendant against the assignor, is bound by that agreement; and cannot, by issuing execution upon the judgment assigned to him, defeat the defendant's right of set-off. *Coombes v. Hatheway*, 3 Kerr 682.

**2—Right of set-off—Admissibility—Administrator.**

In assumpsit upon promises to an intestate, a note of hand made by him, and after his death endorsed to the defendant, cannot be pleaded as a set-off to an action by the administrator. *Curry and Orr, Administrators, v. Hibbard*, Ber. 183.

**3—Penalty—Arbitration bond.**

In an action of debt for the penalty of an arbitration bond, in which the plaintiff assigns as the only breach the non-payment of a certain liquidated sum awarded by the arbitrators to be paid to him by the defendant, a set-off may be pleaded; and such set-off is pleadable to the sum so awarded, and not to the penalty of the bond. *Shaw v. Wilson, et al.*, Ber. 390.

**4**———In assumpsit for supplies and advances; the defendant in order to meet the amount proved by the plaintiffs and to claim a balance, gave in evidence a quantity of logs delivered by the defendant in 1846, to B. & Co., with the assent of the plaintiffs, to pay a debt due from the plaintiffs, to B. & Co.; in reply the plaintiffs shewed an agreement between the defendant and B. & Co., stipulating that the logs were delivered to B. & Co. by defendant,



B. & Co. to give the defendant 20s per thousand, the defendant to pay the plaintiffs through B. & Co. any amount justly due by defendant to plaintiffs, and stumpage to B. & Co., and any balance due after deducting the amount of such account and stumpage, B. & Co. were to pay defendant. The learned Judge told the jury that the defendant was entitled to be allowed for the logs in this action to the extent of paying the plaintiffs' account, but not to claim a balance in the way of set-off. *Held*, That the direction was right. *Wigan et al v. Nixon*, 1 All. 97.

**5** ————A note for the payment of a certain sum in specific articles, becomes a money debt after the time for delivering articles has elapsed ; and a set-off is admissible in an action upon it, under the Act IV. Vic. cap. 4. *Steeres Hopper*, 1 All. 394.

**6—Judgment—Commencement of suit.**

A Judgment recovered by the defendant against the plaintiff after the commencement of the plaintiff's suit cannot be pleaded as a set-off, even though the verdict on which the judgment is founded was given before the commencement of such suit. *Hammond v. Mott*, 3 All. 426.

The defendant's original cause of action being merged in the judgment, the Nisi Prius record in the defendant's suits is not evidence of the plaintiff's indebtedness before the commencement of his suit. *Ibid.*

**7—Judgment—Execution issued.**

It is too late to set off one Judgment against another, after an execution issued upon one of them has been satisfied. *Bradley v. Hopley*, C. Ms. 147.

**8—Judgment not actually signed—Lien**

Defendant had recovered a judgment against the plaintiff in replevin, and issued execution, but nothing was realized on it ; the plaintiff afterwards obtained a verdict against the defendant in assumpsit, and entitled to sign judgment. *Held*—1st. That the defendant had a right to set-off his judgment against the damages recovered by the plaintiff, though the plaintiff's judgment was not actually

signed. 2nd. That the defendant was not precluded from applying to set-off his judgment, by having pleaded it as a set-off in the action of assumpsit;—his judgment not having been signed at the time the action of assumpsit was commenced, and therefore, not being the subject of set-off. 3rd. That, though the defendant's rule did not, in terms, ask to have his judgment set-off subject to the lien of the plaintiff's attorney for costs, it was in the power of the Court to grant the application subject to the lien. *Abell v. Light*, Trin. T. 1867.

**9—Merger of note in judgment before trial.**

Assumpsit with notice of set-off of a promissory note made by the plaintiff and endorsed to the defendant. At the time notice of set-off was given, an action was pending on the note, and before the trial of this action judgment was obtained against the plaintiff on the note; but the judgment was unsatisfied. *Held*, That the note was merged in the judgment and could not be given in evidence under the notice of set-off. *Atkinson v. Keith*, 5 All. 305.

*Semble*, That the only relief for the defendant in such a case would be an application to the Court to be allowed to set-off his judgment against the plaintiff's judgment. *Ib.*

The pendency of a suit, or even a verdict does not change the nature of a debt, but a judgment does. *Ibid.*

**10—Not endorsed—Time.**

A plea of set-off stated—"that before and at the time of exhibiting the bill"—the plaintiff was indebted to the defendant, etc. The declaration was entitled generally of Easter Term, which commenced on the 5th May. *Held*, That a promissory note made by the plaintiff which was endorsed to the defendant on the same 5th May could not be given in evidence under this plea. *Dingee v. Stickney*, Mich. T. 1830.

**11—Notice—What may be shewn under.**

In assumpsit, the defendant may shew, under a notice of set-off for work and labour, and on account stated, that he did work for the plaintiff under a contract under seal; that he did extra work, and that after the completion of

the work, he settled with the plaintiff; that mutual accounts were stated between them, and that a balance was found to be due to defendant. *Holmes v. Billings*, 5 *All* 232.

**12—Set-off—Prima facie evidence of payment, when!**

If a defendant gives a notice and particulars of set-off, which are principally made up of goods furnished the plaintiff, it shews *prima facie* that it was not intended as a payment, and the plaintiff is entitled to costs, though the verdict is under £5. *White v. Dawson*, 2 *All* 51.

**13—Judgment subject to attorney's lien.**

Where the Court allows one judgment to be set off against another, it must be subject to the attorney's lien generally, and not merely to the extent of the taxed costs in the particular suit. *Rogers v. Ledden*, 2 *Kerr* 59.

**14—Judgment in Inferior Court—Beneficial interest.**

*Semble*, The Court will allow a judgment of the Inferior Court of Common Pleas to be set off against a judgment obtained in this Court; although the action in the Common Pleas may have been brought in the name of another person; the defendant in this Court having the sole beneficial interest therein. *Ibid*.

**15—Judgment—Different nature of actions—Lien of Attorney—Order subject to lien.**

Defendant had recovered a judgment against the plaintiff in replevin and issued execution, but nothing was realised on it. The plaintiff afterwards obtained a verdict against the defendant in assumpsit, and was entitled to sign judgment. *Held*, that the defendant had a right to set off his judgment against the damages recovered by the plaintiff, though the plaintiff's judgment was not actually signed. 2nd. That the defendant was not precluded from applying to set off his judgment by having pleaded it as a set off in the action of assumpsit; his judgment not having been signed at the time the action of assumpsit was commenced, and therefore not being the subject of a set off. 3rd. That though the defendant's rule did not in terms ask to have his judgment set off subject to the lien of the plaintiff's attorney for costs, it was in the power of the court to

grant the application subject to such lien. *Abel v. Light*, 6 *All.* 518.

**16—Usury—Recovery of excessive interest under notice of set off.**

The consideration of a note given for a balance found to be due on settlement where nothing would have been owing had lawful interest been only charged, wholly failed, and defendant is entitled to recover under notice of set off everything paid above six per cent. *Peters v. Horton*, 2 *Pug.* 176.

**17—Transfer of debt made for purpose of set off.**

The 91st sec. of the Insolvent Act of 1869 relating to set off applies to the transfer of any debt sought to be set off, whether it was actually payable or not at the time of the assignment. *McLeod Assignee &c. v. Domville*, 2 *Pug.* 422.

**Goods delivered—Whether payment or set off.**

*See Costs* 32. *Little v. Caie.*

**Principal and Agent—Right of set off.**

*See Principal and Agent* 21. *Kennedy v. Turnbull.*

**Corporation—Rent.**

*See Corporation* 16.

**No appropriation towards payment.**

*See Bills and Notes* V. 17.

**Defendant cannot prove his set-off in plaintiff's case—  
Otherwise with payment.**

*See Evidence* VIII. 7.

**No notice of set-off.**

*See Assumpsit* III. 50.

**Set-off, after offer to suffer judgment by defendant—  
Costs.**

*See Judgment* II. 6.

**SEVERAL COUNTS.**

*See Practice* I. 4.—Pleading IV.

**SEVERAL ISSUES.**

*See Costs* 74, 101.

**Postea on.**

*See* Replevin 4.

**SHARES.**

**Assessment on**—Note for, may be given.

*See* Bills and Notes II, 9.

**SHERIFF.****1.—Appointment—Continuance in office.**

The plaintiff was appointed Sheriff of W. in May 1849, and received a commission giving him the office until the first Tuesday in April then next, "and from that time till another fit person should be appointed and sworn into said office." Upon his appointment he appointed H. his deputy, taking a bond with sureties to indemnify him against any misconduct of H. during the time he might continue such deputy. The plaintiff was continued in office till March 1856, his appointment being notified annually in the *Royal Gazette* and new bonds given, as required by the Act 6 Wm. IV, cap. 1, but no new commission was issued to him. The appointment of H. as deputy was notified in the *Gazette* annually, till January 1856, when he was dismissed for misconduct. *Held*, That the plaintiff's tenure of office did not expire in April 1850, but that he continued to hold under the commission, notwithstanding the annual notification in the *Gazette*; that the deputation to H., not being limited by his bond to any particular time, also continued till his dismissal; and that his sureties were also liable. *Botsford v. Henderson*, 4 All. 516.

**2.—Trial of right of property—Not judicial duty—Deputy.**

The duty of the Sheriff on the trial of a claim under a writ *de proprietate probanda*, is a judicial duty, and may therefore be performed by the Deputy Sheriff. The Sheriff may conduct two inquiries at the same time by his deputies. *Crane v. Adams*, 4 All. 59.

**3.—Levy—Two executions—Poundage.**

Where the Sheriff levies under two executions, but the sale does not produce enough to satisfy both, he is only entitled to poundage on the second execution according to the amount applicable to it after satisfying the first. *Wetmore v. DesBrisay*, 4 All. 199.

**4—Execution creditor purchasing goods.**

Where an execution creditor purchases goods at Sheriff's sale, with the knowledge of the Sheriff that the purchase is made in order to satisfy his execution, and the goods are delivered to him by the Sheriff without any demand of payment, the Sheriff cannot recover from him the price of the goods. *Wetmore v. DesBrisay*, 4 All. 199.

**5—Indorsement on writ—Evidence—Costs.**

*Quere*, Whether the indorsement on a writ by the Sheriff of his fees for the service of it, is not conclusive of the amount in the taxation of costs. *Atkinson v. McAuley*, 4 All. 265.

**6—Succeeding Sheriff—Rule.**

A *fi. fa.* was put into a Sheriff's hands, under which he levied on real estate, which was sold in April 1859. The Sheriff went out of office a few days before the sale. A rule calling upon him to hand over the *fi. fa.* to the present Sheriff, moved more than six months after his going out of office, was refused. *Levy v. Lawson*, 4 All. 501.

**7—Poundage—Right to exact.**

The defendant being in gaol on a *ca. sa.* offered bail for the limits to the Sheriff, who refused to take such bail unless the defendant paid or secured, in addition to the usual gaol fees and charges for the limit bond, a certain sum for poundage on the demand for which the defendant was in custody, whereupon one of the bail gave his promissory note to the Sheriff for his poundage. *Held*, That the Sheriff had no right to exact such a note for poundage, or to claim any poundage on the execution under such circumstances. *Roberts v. Watson*, 3 Kerr 414.

**7 a**———Two executions for £6000 each, against the same defendant,—one at the suit of the present defendant individually,—the other, at his snit as executor of S.—were delivered to the Sheriff on the same day, with directions that the first-named execution was to be first satisfied. The Sheriff levied under the executions and was afterwards directed by the attorney to abandon the levies, and return the executions *nulla bona*; which he did, indorsing thereon

his fees for poundage and expense. In an action by the Sheriff to recover poundage on £3000, as the amount of a compromise of the second execution made by the judgment creditor with his debtor, there was no distinct evidence of such a compromise; but, on the Sheriff applying for payment of his fees, the defendant (the judgment creditor) stated that he was about making an arrangement with the debtor, and as soon as it was done, he would settle the plaintiff's bill; on another occasion, he stated, that he had received £9000, of what he was contending for against the debtor. *Held*, in the absence of any evidence by the defendant of what compromise he had made, That the jury were warranted in inferring that the two suits had been compromised for £9000, of which £6000 were applied to satisfy the first execution, leaving £3000 for the latter, and therefore the plaintiff was entitled to recover poundage as on a compromise to that amount; though it was probable, under the evidence, that if the property levied on had been sold by the Sheriff, it would not have produced that sum. *Wetmore v. McLeod*, 5 All. 534.

7 b—Defendant tendered the plaintiff the amount due on a judgment, which he refused to take, and issued execution, under which the Sheriff levied on defendant's property; the defendant then obtained a Judge's order, that on payment to the Sheriff of the amount tendered, the execution should be returned "satisfied," and that satisfaction should be entered on the roll: the defendant thereupon paid this amount to the Sheriff, who returned the execution satisfied. *Held*, That the Sheriff was entitled to retain out of the amount so paid to him, his poundage and execution fees. *Central Bank v. McKeen*, 5 All 529.

See *Infra* 16, 17.

### 8—Liability—Discharge in bankruptcy.

A Sheriff executing a *testatum fi. fa.* on the goods and chattels of the plaintiff,—who had obtained his certificate,—without notice of the proceedings in bankruptcy, was held not liable in trespass, though the debt for which the *testatum fi. fa.* was issued had been proved before the commissioner under the fiat. *Bailey v. Hazen*, 3 Kerr 416.

**9—Sheriff's right to fees—Service of writs by other party.**

Where an application was made under the Act of Assembly 6 Wm. IV, cap. 1, secs. 11, 12, by a Sheriff against an attorney, to compel him to pay the Sheriff's fees in certain suits in which the writs had not been served by the Sheriff. *Held*, That the Court could not order money to be paid to the complainant for which he had performed no service. *Drury v. Howe*, 3 All. 588.

**10—Misconduct—Sheriff's officer—Inquiry into.**

A charge against a Sheriff's officer of misconduct in selling property under execution, cannot be examined in an application to set aside the judgment. *Hardy v. Prince*, 3 All. 264.

**11—Liability—Non-arrest—Damage.**

A Sheriff is not liable to an action for neglecting to arrest a party on *mesne* process, unless the plaintiff has sustained some damage by his neglect. *Curran v. Beckwith*, 3 All. 365.

If the debt for which the process issued is barred by the Statute of Limitations, the Sheriff is not liable for neglecting to execute; and he may give such a defence in evidence under the general issue. *Ibid*.

**12—Duty—Return of writ.**

A Sheriff is bound to return a writ *de proprietate probanda*, though executed by his deputy without his express authority. *Armstrong v. Brown*, 3 All. 399.

**13—Prisoners—Delivery—New Sheriff—Liability.**

If the prisoners be delivered over by the old Sheriff to the new within the goal, with the writs under which they are detained, and the new Sheriff does not require an indenture, he shall be chargeable in case of an escape after such delivery. *Power v. Johnson*, 2 Kerr 43.

An execution bearing *teste* on the day it is issued in vacation, upon a judgment entered up as of the proceeding term, although irregular, is not, since the Act 5 Wm. IV, cap. 37, sec. 10 and 11, a nullity. *Held*, therefore, That



the Sheriff was liable for the escape of a prisoner who had been arrested on a *ca. sa.* so tested. (Chipman, C. J., *dubitante.*) *Ibid.*

**14—Services—No authority from Sheriff—Recovery of fees.**

Under the Act of Assembly 6 Wm. IV, cap. 1 sec. 11, a person serving processes directed to the Sheriff, but without any authority from him, is precluded from maintaining any action for his services. *Herrington v. Lugrin*, 1 Kerr 109.

**15—Proceedings against—Mode.**

Under the general rule of Hil. T. 4 Vic., the mode of proceeding against an ex-Sheriff for not bringing in the body of a defendant, was by *distringas*, and not by attachment, though the practice is otherwise in England. *Henry v. Murphy*. 1 Kerr 207.

**16—Poundage—Attorney's liability.**

Where a defendant was arrested on a *ca. sa.*, and discharged under the Insolvent Confined Debtors' Act, without any part of the money being paid, the Sheriff is not entitled to poundage on the amount of the execution, under the ordinance of fees; but he is entitled to his fees for executing the writ, and both the plaintiff and his attorney are liable therefor. *Kavanagh v. Phelon*, 1 Kerr 472.

**17** ——— The plaintiff's attorney is not liable to the Sheriff for poundage on an execution, unless he receives the amount from the defendant, though the defendant has escaped from the limits, and his bail have paid the debt and costs to the attorney. *Caldwell v. Badger*. 2 All. 516.

**18—Action—Form—Refusing debtor the limits.**

Case, and not trespass, is the proper remedy against a Sheriff for refusing to give a confined debtor the benefit of the gaol limits. *Caldwell v. Winslow*, 2 All. 203.

**19—Parting with goods—Remedy.**

If the Sheriff has parted with goods which he had levied on under an execution, he cannot be called on to sell under a *venditioni exponas*: the remedy against him is by action. *Phillips v. Dickenson*, Trin. T. 1831.

**20—Action of debt does not lie against a sheriff for an escape.**

*See British Statutes.*

**21—Special bailiff—Appointment at request.**

If the Sheriff appoints a special bailiff to execute a writ, at the request of the plaintiff, who himself takes charge of the writ and deputation, which do not again come to the Sheriff's hands in the regular course, the plaintiff cannot rule the sheriff to return the writ. *Kingston v. O'Shea*, 1 *Al.* 678.

If a side-bar rule to return the writ is taken out under such circumstances, it may be set aside with costs; but if not set aside, no attachment will be granted against the Sheriff for disobeying it. *Ibid.*

**22—Defence—Justification—Replevin.**

A Sheriff cannot justify the taking of goods mentioned in a writ of replevin if he take them from a third person who is not named in the writ. *Wiggins v. Garrison and Wood*, *Ber.* 17.

**23—Altered fieri facias.**

In an action of trespass against a Sheriff for taking goods, he cannot justify under a *feri facias* re-issued as an *alias*. *Johnston v. Winslow*, *Ber.* 53.

**24—Remedy against attorney.**

A sheriff who sustains damage by proceeding under an improper writ given to him by an attorney, has his remedy over against such attorney. *Ibid.*

**25—Omission to advertise and sell.**

If a Sheriff levies on real estate and omits to advertise it, and returns on the execution, that "the lands remain unsold for want of buyers"—this is a breach of his duty, and a false return. It is the Sheriff's duty to advertise and sell under the *fi. fa.* and not to wait for a *renditioni exponas*. *Jarvis v. Miller*, *Ber.* 191.

**26—Surplus from sale—Proceeds—Appropriation.**

A Sheriff has no right to apply any surplus remaining in his hands from a sale under a prior execution to one received after such sale. *Stevenson v. Douglas*, *Ber.* 281.

**27**——The Court will not order a Sheriff to retain in his hands money which he has levied for A. on an execution in order to satisfy an execution in his hands against A. *Bradley v. Hopley, C. Ms.* 147.

**28—Demand for rent.**

Sheriff entitled to a reasonable time to make inquiries as to rent demanded. *See* Landlord and Tenant III. 15.

**29—Excessive levy—Liability of sureties on bond.**

Where a Sheriff is directed to levy under a *fi. fa.* a certain amount and he seises and sells for a greater sum he is guilty of a breach of his duties of office and his trustees are liable on their bond. *See* Bond 38. *Miller v. Weldon.*

**What constitutes a levy.**

*See* Execution.

**Making levy prior to assignment under Insolvent Act.**

*See* Trover. *Harris v. Vail.*

**30—Rule—Entry of.**

A rule for a Sheriff to pay over money in his hands, cannot be entered on the motion paper and moved on fourteen days notice. *Ex parte Graham, 6 All.* 209.

**31—Service of writ—Sheriff interested—Inspector of estate.**

Plaintiff as assignee of the estate of H. an Insolvent brought replevin, the writ being directed to and served by the Sheriff, who was also an Inspector of the estate. *Held* that the Sheriff, as Inspector, was interested in the suit and the writ of replevin was set aside. *Fairweather &c. v. Neviers, 2 Pug.* 524.

**Liability of Attorney General for Sheriff's fees.**

*See* Attorney General 3.

**Escape—Liability—Damages.**

*See* Escape—Damages I. 12.

**Remedy of creditor after proceedings taken against Sheriff.**

*See* Discharge 2—Escape 1.

**Rule for body may be taken out in Term without motion.**

*See Practice VIII. 5.*

**Coroner—Jury process.**

*Quere*, Whether it is necessary to direct any other but jury process to a Coroner, when the only objection to the Sheriff is, that he is related to defendant. *Stevenson v. Douglas, Ber. 281.*

**Sale—Wrongful conversion by Sheriff.**

*See Trover 29.*

**Unauthorised charges—Election petition.**

*See Costs V. 128.*

### SHERIFF'S BOND.

*See Bond F.*

### SHERIFF'S DEED.

**1—Affidavit—Miscalling execution.**

The affidavit of the Sheriff under the Act 4 Wm. IV. cap. 22, as to the preliminary steps having been duly taken before the sale of real estate seized in execution, must be made at the same time as the deed of conveyance; and as a deed must in the absence of evidence to the contrary, be presumed to have been executed on the day it bears date, an affidavit purporting to have been sworn on the 2nd February, when the deed bore date the 22nd January previous, and no other proof of the time was offered, was held insufficient. *Doe d. Bustin v. Donnelly, 3 Kerr 66.*

The miscalling an execution a *testatum fieri facias* in the Sheriff's deed, whereas it was in fact a *fieri facias*, is not a fatal error: the execution being properly set out in the deed. *Ibid.*

**2—Regularity of proceedings—Presumption.**

A. purchased lands at Sheriff's sale in 1831, and took possession with the assent of the judgment debtor, who never disputed A.'s right or the regularity of the proceedings. *Held*, in an action of trespass against A. by a person who shewed no title, and had only recently obtained possession, but did not claim under the judgment debtor,

that it would be presumed that the Sheriff's proceedings were regular, though there was no evidence of any execution issued or advertisement of the property; and that the Sheriff's deed was therefore properly admitted in evidence. *McLardy v. Flaherty*, 3 Kerr 455.

**Restraining sale—Injunction.**

*See Practice in Equity II. 4.*

**3—Execution of deed—Parol evidence.**

Where a Sheriff's deed and his affidavit of due execution and sale bear different dates, parol evidence is admissible to prove that they were executed on the same day. *Doe d. Connell v. Dickenson*, 1 Hun. 456.

**Affidavit to be made at same time that deed is executed—Presumption as to time.**

*See Deed I. 37.*

**Affidavit by Deputy Sheriff on deed—Proof of authority.**

*See Evidence XI. 1.*

**4—Sale—Former judgment—Relation.**

The title conveyed by a Sheriff's deed, to land sold under execution issued upon a judgment recovered in an action brought on a former judgment of this same Court, does not relate back to the time of signing the first judgment, so as to affect a conveyance made by the judgment debtor between the times of the signing the first and second judgment. *Doe d. Peabody v. McKnight*, Ber. 376.

**5—Judgment—Attaching of—Execution—Relation—Recital not curtailing the granting part.**

A Sheriff's deed recited that the Sheriff had seized all the right and title which the judgment debtor had in a certain piece of land (describing it) at the time of registering a memorial of judgment: the granting part of the deed conveyed "all the said lands and tenements." At the time of registering the memorial, the debtor had no title to the land, but it was afterwards granted to him, and he conveyed it to the defendant before the execution issued. *Held*, 1st. That the judgment attached upon the land when it was granted to the debtor; and that when the execution

issued, it related back to the registry of the memorial, and defeated the conveyance to the defendant; 2nd. That the granting part of the deed was not controlled by the recital; but conveyed all the land described in the deed. *Doe dem. Kerr v. Jamieson, Trin. T. 1871.*

**6—Variance between execution and judgment—Execution—Alias—Proof of original not necessary.**

In ejectment, claiming under a Sheriff's deed, the execution under which the sale took place, recited a judgment for £1105 11s. debt, and £5 11s. costs: the judgment was for £1105 11s. in the whole. *Held*, That the variance was only an irregularity, which could not be taken advantage of at the trial. *Held*, also—the sale being under an *alias*, the original execution need not be proved. *Doe d. Walsh v. Dalton, 6 All. 387.*

**SHERIFF'S SALE.**

**1—What may be taken in execution—Notice—Levy—Advertisement—Evidence—Presumption—Recitals.**

Real estate in remainder or reversion may be taken in execution and sold at Sheriff's sale, under the Act 26 Geo. III. cap. 12. *Doe v. Hazen, 3 All. 87.*

The "six months" notice of sale required by the Act are lunar months. *Ibid.*

The Sheriff need not make an actual entry on the land to levy. The advertisement is proof of a levy. *Ibid.*

An advertisement in which the number of the lot of land to be sold is left blank, is sufficient. *Doe v. Hazen. 3 All. 87.*

The recital in a Sheriff's deed of other judgments besides that under which the sale took place, does not affect the deed, or render proof of such judgment necessary. *Ibid.*

In making title under a Sheriff's deed more than twenty years old, where the sale was under a *venditioni exponas*, and the land had been advertised in the *Gazette*. *Held*, (in the absence of evidence to the contrary) that it might be presumed—1st. That a legal levy had been made under a *fi. fa.*; 2nd, That no newspaper was published in the

County; 3rd, That the other notices required by the Act had been given; and 4th, That the sale took place during the hours prescribed by law. *Ibid.*

Any irregularity in issuing the *venditioni exponas* will not affect a purchaser under the Sheriff's deed. *Ibid.*

The acquiescence of the judgment debtor in a Sheriff's sale and subsequent possession of the land by the purchaser, short of twenty years, though presumptive evidence that all the necessary proceedings had been taken, will not give a title to the purchaser by estoppel. *Ibid.*

### **2—Vesting of estate—Purchase—No conveyance.**

A., a judgment creditor, pointed out land to the Sheriff as the property of B. his debtor, which the Sheriff levied upon and sold, and A. became the purchaser, with a knowledge that a third person claimed the title. A. afterwards finding that B. had no title refused to complete the purchase, and no return was made upon the execution. *Held*, That the mere purchase, without any conveyance from the Sheriff, vested no estate in A., and was no satisfaction of the judgment, and therefore that A. had still a right to issue a *ca. sa.* thereon. *Held* also, That after the sale B. might have applied to the Court to have satisfaction entered on the record. *Stewart v. Brundage*, 1 *All.* 205.

### **3—Separate lots—Selling—Time.**

A Sheriff may sell land under an execution, in separate lots, and at any time between the hours named in the Act 26 Geo. III., cap 12. *Doe v. Watson*, 1 *All.* 675.

### **4—Advertising—Places.**

Lands seized by the Sheriff under execution, must be advertised at the Court House; at the office of the Registrar of Deeds; and in the other places mentioned in the 1 Rev. Stat. cap. 118, sec. 8; as well as in the local newspaper. *Doe dem. Kerr v. Jamieson*, *Mich. T.* 1869.

### **Purchaser at Sheriff's sale—Operation of Stat. 27 Eliz. cap. 4.**

*See* Deed II. 2, 3.

### **Purchase of equity of redemption by mortgagee—Effect.**

*See* Mortgage 17.

**Judgment creditor—Necessity of sale under execution before contesting title—Locus Standi.**

See Practice in Equity II. 4.

Person claiming property under Sheriff's sale under execution, not necessary to prove the docketing of judgment. See *Doe dcm. Barlow v. Hatfield*, 1 Kerr 417.

**SHIP.****Change of ownership during voyage—Liability to Master—Vessel lost.**

See Shipping Law 15.

**SHIPPING LAW.****1—Registered owner—Repairs—Liability.**

The registered owner of a vessel is not liable for the expense of repairs put upon her, unless the work was done upon his credit, and by his authority express or implied. *Thompson v. Hughes*, Hil. T. 1894.

2—The defendant having advanced money to D. to build a ship, became the registered owner of three-fourths of the ship as a security for his advances, with an agreement that she should be sold in England, and his debt paid out of the proceeds of the sale. The ship being at St. John, and requiring repairs to enable her to go to England, D. and the master of the ship employed the plaintiff to do the work, directing him to charge it to the owners. The ship was sent to England and sold, and the defendant got the proceeds. *Held*, That he was liable for the repairs. *Williams v. Wood*, 4 All. 362.

**3—Bona fide purchaser—Legal title—Prior unregistered mortgage—Notice.**

The *bona fide* purchaser of a ship, with a legal title according to the provisions of "The Merchant Shipping Act, 1854," is not bound by notice of a prior unregistered mortgage; therefore, an injunction was refused, on the application of an unregistered mortgagee, to restrain the purchaser of a ship at Sheriff's sale, and who, as such purchaser, had become the registered owner, from disposing of the ship until the mortgage was satisfied, though he purchased with notice of the mortgage. (*Ritchie, J., dubitante.*) *DeWolfe v. Carvill*, 6 All. 299.



**4—Negligence of master—Liability of owner of vessel.**

The registered owner of a vessel is not liable for goods lost by the fraud or negligence of the master during a voyage, unless the master is employed by or acting for him. Therefore, where defendant made advances to A. to enable him to build a vessel, and took the registry in his own name to secure his debt; but the vessel was sailed by A., and the defendant had no interest in her earnings, and did not employ the master—*Held*, That he was not liable for goods lost through the negligence of the master. *Newbury v. Young*, 1 *Pug.* 148.

**5—Certificate of registry—Refusal to deliver up.**

A person who had been part owner of a ship, and as such had possession of the certificate of registry, and who refuses to deliver it up to a purchaser of the ship at Sheriff's sale, is not liable to the penalty imposed by the 50th section of "The Merchant Shipping Act, 1854," such certificate not being required by the purchaser for "the lawful navigation" of the ship; but, to enable him to perfect his title, by having the change of ownership indorsed upon it, or by delivering it up, and obtaining a new certificate in lieu of it. *Reg. v. McAvity*, 1 *Pug.* 193.

**6—Unregistered vessel—Chattel—Transfer—Re-vesting of property—Evidence.**

The property in an unregistered ship may be transferred by parol like any other personal chattel. A registry procured by fraud on the true owner, by a person who had obtained possession of the builder's certificate, and made a false declaration of ownership at the Custom House, is null and void, and will be considered at law as well as in equity not to affect the property and right of possession as against the owner and his lawful assignee. The cancelling and giving up of a bill of sale, and at the same time of a bill of exchange given for the consideration money, upon an agreement to annul the sale, is sufficient *prima facie* evidence of re-vesting the property, although there be no actual redelivery of the possession. *McLean v. Grant*, 1 *Kerr* 50.

**7—Stranded vessel—Agreement for sale—No property passing.**

The owner of a vessel lying stranded on the shore, and abandoned by her crew, agreed with A. by a memorandum in writing, to sell him the vessel, for a certain sum, for which promissory notes were given payable at future days, and it was stipulated that a bill of sale and register would be given by B. when the notes were paid. Upon this agreement being made, B. authorized A. to take possession, and A. accordingly took possession of the vessel, repaired and fitted her out for sea, and was employed in navigating her, when B. forcibly resumed the possession. *Held*, That no property having passed under such agreement, B. still remained the legal owner, and that A could not maintain trespass against B. for such taking. *Brown v. Nickerson*, 1 Kerr 467.

**8—Seaman's wages—Liability of part owner.**

A part owner of a vessel is liable to be sued for seaman's wages under the Act 6 Wm. IV., cap. 44. *Ex parte Wood*, 1 All. 422.

**9—Deviation in voyage—Right to sue for wages.**

Where a seaman shipped at Liverpool, England, and signed articles which thus described the voyage: "To come out to Saint John in a ship called the *Portland*, to be under the command of the master of the *Portland* until her arrival in St. John, New Brunswick, there to leave the *Portland*, and to go in a new ship commanded by the master, and to continue by her until her arrival at her port of discharge in the United Kingdom." *Held*, That an avowed intention to go to Savannah, in Georgia, previous to her return to Great Britain, was an intended departure sufficient to justify the seaman leaving the ship and suing for wages. *Hayward v. Maine*, 1 Kerr 292.

**Deviation—Right in seamen to determine contract—Jurisdiction in Justice to make order for payment.**

See Justice of the Peace II. 3.

**10—Loss by jettison—Contribution—Custom.**

Where the owner of a ship is also the owner of part of

the cargo, which was thrown overboard for the preservation of the ship in the course of the voyage, on which assurance was effected—*Held*, That such owner might recover from the insurer on the ship the average proportion which the ship would be liable to contribute to the loss sustained by such jettison of the cargo. Where the goods are laden on deck, according to the custom of a particular trade, the owner thereof is entitled to contribution in general average for a loss by jettison. *Marks v. Watson*, 2 Kerr 211.

**Overloading vessel—Consent of owner of goods—Bill of lading.**

*See* Carrier 1, 2.

**11—Ship owner—Right of owner of goods to demand them on landing.**

*Semble*, That the owner of goods has a right to demand them from the ship owner as they are landed, on payment of the freight due.

D. C. & Co., merchants of London, forwarded to D. at St. John, a quantity of iron on board defendant's ship, the master of which gave D. C. & Co., a bill of lading to deliver the goods to them on their order. D. C. & Co. omitted to indorse the bill of lading, and defendant refused to deliver the goods to D. *Held*, per. Allen. C. J., and Fisher. J., That D. being owner of the goods was entitled to receive them, and that defendant was liable for the wrongful detention. *Davisville v. Ferguson*, 1 P. & B. 40.

**12—Bill of lading—Agreement of weight with quantity—Right of owner to ascertain.**

Where a bill of lading contained the words "weight and contents unknown" it was held per Allen, C. J., and Welton, J., that the owner of the goods covered by it had no right to require them to be weighed to ascertain if the weight agree with the quantity stated in the bill of lading. *Ibid*.

**13—Ownership—Sufficient proof of—Receipt of goods—Bill of lading—Implied contract to pay freight.**

In an action for freight by a ship-owner, proof that

plaintiff had for several years the management of the vessel, and run her, taking charge of her when she arrived in port and paying the captain and crew, is sufficient evidence for a jury of plaintiff's ownership.

D. & Co., merchants, doing business in London, shipped from that port a quantity of iron belonging to defendant on board plaintiff's vessel, to be delivered at the port of St. John. By the bill of lading the property was deliverable to D. & Co. or their assigns, but the bill was not indorsed by D. & Co., and when the vessel arrived at St. John plaintiff refused to deliver the iron to defendant, though he demanded it as his property and made a tender of the freight. Defendant then replevied the iron, and so obtained possession of it. Plaintiff thereupon sued for amount of the freight, and on the trial the jury were directed that if defendant received the iron under the bill of lading, he was liable for the freight on the bill. *Held*, an erroneous direction, That, as the bill of lading was not endorsed, defendant could not claim the goods under it: and that, if any contract to pay the freight could be implied from defendants taking the property, this was a question which ought to have been submitted to the jury.

*Quære*, Whether, from the circumstances above stated, a contract to pay freight could be implied. *Ferguson v. Domville*, 3 *Pug.* 288.

#### **14—Change of ownership of vessel—Termination of contract—Plan of suit—Verbal contract.**

Where a seaman agreed by articles to perform a voyage from Great Britain to America and thence back again to the United Kingdom, and the contract was terminated by reason of a change of ownership having taken place, the Court held he was not in a position to sue in this Province for wages due him up to the time of transfer under sec. 190 of the Merchant Shipping Act, but should have proceeded to England and sued.

A verbal contract made at Sydney between a seaman and the master for the former to go to England, is illegal under the Act, and the seaman has the right to terminate

it at any time, and recover for his service for the time he was actually employed. *Regina v. Peters*, 2 *Pug.* 352.

**15—Master's wages—Vessel lost—Change of owners.**

On 2nd Sept., O. the owner of a vessel, employed plaintiff at the salary of \$80 per month, to proceed to New York, where the vessel then was, and to take charge of her as master. Proceeding to New York he sailed in her on Sept. 21st. On Oct. 9th she was abandoned at sea in a sinking condition. Plaintiff and crew were saved, and after discharging the crew, the master proceeded to L. and reported himself to the ship's agents. On 3rd October the vessel was transferred by O. to defendant, the latter appearing on the Registry as absolute owner, though he held her only as trustee for O.'s creditors. O. being unable to affect an arrangement with his creditors, subsequently went into insolvency. On November 20th, defendant was appointed creditor's assignee, and the property in this vessel became vested in him as such assignee. Plaintiff now sued defendant for his wages from September 2nd, till October 9th, when the vessel was abandoned at sea, also for money paid by him for his passage to New York, also for board and expenses there until the vessel sailed, and for board and expenses subsequent to the loss of the ship.

*Held*, (per Allen, C. J., and Wetmore, Duff, J. J.,) That defendant was not liable for any portion of plaintiff's claim: but, per Weldon and Fisher, J. J., that he was liable for wages from 3rd to 9th October. *Simpson v. Deveber*, 1 *P. & B.* 316.

**16—Deck load—General average contribution—Action for goods jettisoned.**

Whenever it is shewn that the loading of cargo on deck is lawful by reason of contract, or the usage of trade, the rule of the maritime law as to general average contribution applies, and all the interests in jeopardy are bound to contribute for any portion of cargo jettisoned for their preservation, and the legal right to contribution which results therefrom, can only be repelled or displaced by a plainly established usage negating the claim to such con-

tribution, the burthen of establishing which is upon the defendant.

An action for goods jettisoned will lie although the master has signed clear bills of lading for them and should not have stowed them on deck. *Cameron v. Domville*, 1 P. & B. 647.

**17—Charter of vessel—Owner pro. tem—Master—Agent.**

Where a vessel is chartered for a voyage, the charterer is considered the owner *pro tempore*, and the master, whether appointed by him or not, is considered as his agent in signing bills of lading; and the charterer is liable for any misconduct of the master arising out of the obligations of the bills of lading. *Burpee v. Carvill*, 3 Pug. 141.

**18—Charter party—Delay in loading—Defendant not supplying cargo—Term “responsibility.”**

A charter party contained the following clauses:—“It is agreed that as this charter party is entered into by the charterer for account of another party, his responsibility ceases as soon as the cargo is on board, the vessel holding a lien on the cargo for freight and demurrage; the usual custom of each port is to be observed by each party in cases were not specially expressed; cargo to be delivered at St. John as fast as required, cargo to be delivered alongside vessel at St. John, at shipper's risk and expense, and twelve running days for discharging cargo; demurrage at the rate of £10 sterling a day, if longer detained.” The ship was made ready to receive cargo, and the defendant was duly notified of this. The ship was loaded and bills of lading signed according to the charter party. There was delay in loading owing to the defendant not supplying cargo as fast as required. *Held*, That the defendant was liable for damages for the delay caused by his not delivering the cargo as fast as required, and that the clauses for lien and exemption did not apply to damages for delay in loading at the port of loading. That, the defendant having once had notice that the vessel was ready to receive cargo, he was bound to furnish it without further demand or request as fast as it was required for loading, and so that the ship should not be delayed for want of it.

*Quere*, Whether the term "responsibility" in this charter party is equivalent to the term "liability." *Schofield v. Gibson*. *Gibson Appellant v. Schofield*, 1 P. & B. 619.

**19—Ferry boats—Transfer of.**

The title to ferry boats running in the harbour of St. John, must be transferred according to the provisions of the Merchant Shipping Act. *Lloyd v. E. & N. A. Railway Co.*, 2 P. & B. 194.

**Salvage—Claim for salvage services—Action at law maintainable.**

*See* Action at Law, IX., 5. *Copp v. Read*.

**Sale of vessel under certificate of sale—Action for proceeds of sale by three or four owners; contract with defendant a joint contract and all the owners should be joined in the action against the defendant.**

*See* Action at Law, XIII., 2. *Campbell v. Jones*.

**SHORE.**

**Grant bounded by.**

*See* Crown Grant I. 13.

**Right of riparian proprietor.**

*See* Riparian proprietor.

**SIMILITER.**

A cause is at issue though no similiter is added. *Doe v. Smith*, 1 All. 580.

**SLANDER.**

*See* Defamation.

**SMUGGLING.**

*See* Criminal Law. *See* Revenue Law.

**SOUND AND DISPOSING MIND.**

*See* Will.;

**SOUTH BAY BOOM COMPANY.**

**Rights under Statute to receive Boomage.**

*See* Boomage.

**SPECIAL JURY.**

*See* Jury.

**SPECIAL PAPER.**

*See Practice—Waiver—General Rules 122, 123.*

**SPECIFIC ARTICLES.****Note for—Damages.**

A note for the payment of a certain sum in specific articles, becomes a money debt after the time for delivering the articles has elapsed ; and a set-off is admissible in an action upon it, under the Act 4 Vic. cap. 4. *Steeves v. Hopper*, 1 *All.* 394.

*Quere*, Whether the plaintiff could declare for special damages for not delivering the articles ? If he could, the consideration on which the contract was made should be stated. *Ibid.*

*See Bills and Notes* I. 12, 13, 14.

**SPECIFIC PERFORMANCE.****Delay.**

Though in equity, time is not always the essence of a contract ; yet after a delay of four years, specific performance will not in general be decreed. *Purvis v. Hume*, 3 *All.* 299.

*See Equity—Practice in Equity.*

“ *Landlord and Tenant* I. 3.

“ *Covenant* 16.

**Bill of sale of property after acquired.**

*See Bill of Sale* 2.

**STAKEHOLDER.**

*See Action at Law* I. 3.

**STAMPS.**

*See Bills and Notes* I.

**Unstamped Check.**

*See Check* 1.

**STATU QUO.**

*See Practise in Equity* 34.

“ *Assumpsit* III. 29.

**STATUTES.**

*See British Statutes—Foreign Law.*



**1—Lumber Act—Expiration of old Act—Liability under new.**

The Lumber Act 1 Wm. IV. cap. 45, making the first purchaser of the lumber, after the survey, liable to pay the surveyor's fees, having expired before action brought—*Held*, That the liability of the defendant, depending on such Act, did not continue after the expiration thereof. *Held* also, That the new Act 7 Wm. IV. cap. 10, does not apply to services performed under the old Act. *Cunningham v. Pollock*, 1 Kerr 324.

**2—Power to appoint officers to enforce regulations—Implied powers—Impounding cattle—Fees.**

By 1 Rev. Stat. cap. 104, the proprietors of islands in rivers are authorized to meet annually and make regulations for the managing, improving, and better husbandry of the said islands," and to "appoint pound-keepers and other officers to enforce such regulations. *Held*, That under this section the proprietors had the right to make orders for the impounding of cattle found upon the land, contrary to such regulations, this power being necessarily implied in the right expressly given to "appoint pound-keepers and other officers to enforce the regulations." The Court were also of opinion that the right to impose reasonable fees to the officers appointed to enforce the regulations, is also necessarily implied in the power to appoint such officers, their authority to take fees being given by Statute.

*Quare*, Whether 1 Rev. Stat. cap. 104, gave the proprietors power to make a regulations directing the sale of cattle impounded. Such a regulation, however, though it might be bad as against strangers, would be good as against a party present when it was made and assenting to it. *Dickie v. Lawson*, 2 Pug. 46.

**3—Retrospective operation.**

It is a general rule that a statute shall not be construed to operate retrospectively, unless it is expressly made applicable to past transactions, or the words can have no meaning unless such a construction is adopted. *Smith v. Burke*, 3 Pug. 130.

**4—Reference to repealed Act to aid in construction in subsequent Act—Technical meaning.**

Acts relating to the same subject though repealed may be referred to for the purpose of giving a construction to similar words in the subsequent Act.

Where the Legislature by several statutes passed at different times authorized a City Council to make or repair "pavements of stone, deal or plank," and to assess the owners of property benefitted thereby for the expenses thereof, and subsequently by an Act repealing the previous enactments, gave power to make or repair any "flagging or pavement," (omitting words of description) and to make assessments, &c., it was held by the Court that the word "pavement" was not to be understood in its technical sense, but in the sense which had been applied to it by the Legislature in the previous Acts, and that it included either stone, deal or plank. *Exparte Lugin*, 3 *Pug.* 125.

**5—Directory—Bank charter—Declaring in form to be prescribed.**

The 20th section of the Act 4 Wm. IV., cap. 44, incorporating the Central Bank which declares that every bond, bank bill or other instrument by which the Corporation may be held liable for the payment of money, shall declare in such form as the Directors shall prescribe, that payment should be made out of the joint funds of the Corporation, is directory only; and its non-observance does not render such instrument void. *Berton v. Central Bank*, 5 *All.* 498.

**6—Mortgage given in Maine to secure debt in betting on horse race—No evidence of illegality.**

Question as to legality of mortgage given to secure debt incurred by betting on horse race, no evidence being given that horse racing was illegal in State of Maine, nor evidence given as to construction of Statute by the Court, held that the Sheriff in the absence of any such evidence was wrong in directing the jury that the mortgage given was void. *Bailey v. McDuffee*, 2 *P. & B.* 26.

**7—Entry fees for jurors—Act respecting, not retrospective**

*Held* by Allen, C. J., Weldon, Fisher and Duff, J. J.,

(Wetmore, J., *diss.*) That the Act 40 Vic cap. 4 sec. 1. (Consol. Stat. cap. 45 sec 39) which provides that on the entry of any cause for trial at any Circuit Court, the party entering shall deposit in the hands of the clerk of the circuit, the sum of seven dollars to be applied towards the payment of petit jurors, etc., is not retrospective and does not apply to cases standing as remanets when that Act came into force, May 1st 1877. *Doe d. Johnson v. Milne*, 2 P. & B. 375.

**8—Word “may” construed “must.”**

Where a Statute says a thing *may* be done which is for the public benefit, it shall be construed that it *must* be done, the word *may* is held to be imperative. *Gilbert ex parte*, 1 Pug. 231.

9 ————The operation of the 38 Vic. cap. 4, Consol. Stat. cap. 42) is not confined to causes of action which have arisen since the passing of the Act. *McIntosh v. Burness*, 3 Pug. 253.

**When penal—Construction of.**

*See Insolvent Act. Jones v. Hanford.*

**10—Repeal—Subsequent Act.**

An affirmative Statute is a repeal of a precedent affirmative Statute where its matter necessarily implies a negative, and the repugnancy such that the two Acts cannot be reconciled. *Ex parte Byrne*, 2 Pug. 125.

**Construction of Statute when doubtful. benefit of doubt to be given to those who might be prejudiced by the exercise of the powers given by the Act.**

*See Mandamus* 16.

The Act 26 Geo. III. relating to the execution of wills must be read subject to to the Imperial Statute 25 Geo. II. cap. 6. *See Wills.*

**Insolvent Act of 1869—Unjust preference.**

*See Insolvent Act. McLeod v. McLeod.*

**Railway Act.**

*See Mandamus.*

**Cumulative remedy.**

*See Wharfage* 1,—Justice of Peace IV. 28.

**Directory.**

*See Bank 1—Deed I. 31.*

**Re-inspection of fish.**

*See Evidence III. 6.*

**Where any particular practice has been prescribed by Statute, it must be strictly followed.**

*See Lingley v. Huestis, 2 Kerr 4.*

**Known intent disregarded when words of Statute unambiguous.**

*See Revenue Act.*

**Revised Statutes—Power to amend mistakes in.**

*See Mistakes.*

**Rights under Statute.**

*See Boomage.*

**STATUTE OF FRAUDS.**

“ Contract 14.—Frauds (Statute of.)

**STATUTE OF LIMITATIONS.**

“ Limitation of Actions.

**STATUTE LABOR.**

“ Postmaster.

**Prosecution.**

In a prosecution under the Act 5 Wm. IV., cap. 2, for non-performance of statute labor, it must be proved that the party had been notified by the overseer, of the time and place of meeting to perform the work; and where the affidavits, in answer to an application for a *certiorari* to remove the proceedings in such a prosecution, stated that the party had been *duly notified*, the Court made the rule absolute, in order to ascertain what the notice really was—the applicant having in his affidavit denied notice. *Ex parte Ferguson, 1 All. 668.*

*Semble*, That it is not essential to notify the party to bring any implement to perform the work; and unless he is so notified, he need not bring any. *Ibid.*

**STATUTORY FORM.**

*See Bond (Replevin Bond.)*

**STATUTORY TITLE.**

*See* Evidence II. 38.

**STAYING PROCEEDINGS.**

“ Practice VI.

**STET PROCESSUS.**

“ Judgment as in case of Non-suit II. 6.

**STEVEDORE.**

**No implied contract to pay expenses.**

*See* Contract 7.

**STOCK.**

**Liability to be taken on execution.**

*See* Execution IV. 28.

**Liability to assessment by persons subscribing for.**

*See* Assessment 19.

**Liability for calls—Shareholders.**

*See* Assessment 28.

**STOCKHOLDER.**

“ Corporation—Joint Stock Company—Bank—Winding-up Act.

**STOLEN GOODS.**

*See* Trover 3.

**Restoring goods—Order of Judge.**

*See* Criminal Law II. 5.

**STUDENT.**

**Student at law—Graduate.**

To entitle a student at law to the benefit of the reduction of the term of study allowed to graduates by the Act 26 Vic. cap. 28, he must be a graduate at the time of commencing his study. *Ex parte Travis*, 1 Han. 30.

**SUBPENA.**

*See* Attachment 6, 7, 8.

**SUBSCRIBING WITNESS.**

*See* Witness.

**SUBSEQUENT CREDITOR.**

**Prior judgment against—Application to set aside.**

*See* Judgment I. *Robinson v. N.B. & Canada Railway Co.*

**Voluntary conveyance of land good against subsequent creditor.**

See Deed II. 4. *Doe dem. Roup v. Trentowsky.*

**SUBSEQUENT PURCHASER.**

See Deed V. 12. *Dormer v. Gordon.*

“ License 12. *Doe dem. Bowen v. Robertson.*

**SUBSTITUTED AGREEMENT.**

“ Contract 14—Agreement 2.

**SUMMARY ACTION.**

“ Judgment by Default—Costs 55.

**1.—Commencement of action.**

The day of the issuing of a summary writ, and not the day of the teste, is considered the commencement of the action; therefore a process sued out on a demand which accrued subsequent to the teste but before the issuing, was held sufficient. *Stepnenson v. McLellan*, 1 *All.* 19.

**2.—Plea before appearance—Waiver.**

Under the summary Act 4 Wm. IV., cap. 41, (12 Vic. cap. 40,) a plea filed before an appearance entered, is a nullity; and it is doubtful whether it can be waived. If it can, a demand of particulars of set-off is not a waiver of it. *Andrews v. Hanson*, 1 *All.* 509.

A demand of particulars is not a step in the cause. *Ibid.*

**3.—Verdict—Finality—Below £20.**

The rule that the verdict is final in summary actions, will be applied to other actions for mere money demands, where the verdict is for the defendant, and the only amount which the plaintiff could have recovered is less than £20. *McAllister v. Day*, 4 *All.* 37.

**4.—Several defendants—Death—Suggestion.**

If one of several defendants in a summary action dies before interlocutory judgment, the plaintiff should make a suggestion of the death in the memorandum of judgment and subsequent proceedings, or the judgment will be set aside for irregularity. Where such suggestion was omitted, the plaintiff was allowed to amend on payment of costs. *Crane v. Goodine et al.*, 4 *All.* 371.

**5—Plea—Nil debet.**

*Nil debet* is a good plea in a summary action of debt on a record, under the Act 12 Vic. cap. 40. *Wetmore v. Provan*, 4 All. 442.

**6—Jury.**

The finding of a jury, improperly summoned, in a summary action, is not final under the Act 12 Vic. cap. 40. *Wetmore v. Lery*, 4 All. 510.

**7—Member of Assembly.**

A member of the General Assembly cannot be sued by a summary writ, under the Act 12 Vic. cap. 40. *DesBrisay v. Steadman*, 4 All. 597.

**SUMMARY CONVICTION.**

See Justice of Peace.

**SUMMARY EJECTMENT.**

See Landlord and tenant.

**SUMMONS.****Service of.**

See Practice IV.

**Party appearing.**

See Justice of the Peace IV. 16 a, 17.

**Members of House of Assembly must be sued by bill and summons.**

See Arrest 3.

**Setting aside of.**

See Practise VI.

**SUPERSEDEAS.**

The issuing of a *fi. fa.*, which is not returned, will not deprive a prisoner of a supersedeas. *Jackson v. Black*, 4 All. 79.

See Absconding Debtor.

**Not charging in execution—Settlement pending.**

A defendant, rendered by his bail after judgment, wrote to his attorney, requesting him to see the plaintiff's attorney and endeavor to compromise the debt and get

time for payment. Within three months after the render of the defendant, this letter was communicated to the plaintiff's attorney, who, after seeing the plaintiff, informed the defendant's attorney of the terms on which the plaintiff was willing to settle. *Held*, That it was the duty of the defendant's attorney to communicate the offer to his client, and that until he did so, the treaty for settlement was pending, and the defendant was not entitled to a supersedeas for not being charged in execution within three months after the render. *Jones v. Steeves*, 1 *Han.* 260.

### SUPREME COURT IN EQUITY.

See Practice in Equity—Equity.

#### 1—Appeal—Time—Decree.

An appeal from a decree in Equity under the Act 17 Vic. cap. 18, sec. 32, may be made within twenty days after the minutes of the decree have been settled by the Clerk. *Frost v. Nichols*, 3 *All.* 297.

For the purpose of appeal, the decision of the cause is not the pronouncing the decree by the Judge, but the formal entry of it by the Clerk, when perfected. *Ibid.*

2 ——— An appeal to the Queen in Council, under the order of November 1852, from a judgment of this Court affirming a decree in equity, may be applied for within fourteen days after the minutes of the decree are settled, though more than fourteen days have elapsed since the judgment was pronounced. *Brookfield v. The St. Andrews and Quebec Railway Company*, 4 *All.* 496.

#### 3—Costs.

Costs of interlocutory proceedings being generally in the discretion of the Court before which the proceedings are had, a Court of Appeal will not interfere unless it is evident that injustice has been done. *Allen v. Trenholm*, 3 *All.* 421.

As a general rule, appeals are not entertained in questions of costs. *Ibid.*

4 ——— Appeal does not lie from mere opinion of Judge,



there must be an order or decree. *Hodge v. Reid*, 2 *Pug.* 26.

*See further as to Appeals—Appeals.*

**5—Costs—Reversal of order of Judge.**

Where an order of a Judge in Equity is reversed on appeal, the Court of Appeal has power to order that the costs of the proceedings in the Court below be allowed to the applicant. *Wiggins v. Hendricks*, *Hil. T.* 1873.

**6—Evidence—Discretion as to use of.**

On a reference in a suit in equity to take an account, the Barrister received evidence of a claim by the plaintiff in a matter not mentioned in the reference, but made no report upon the validity of the claim. At the hearing of the cause, this evidence was not used, and a decree was made without noticing this claim. *Held*, on appeal from this decree, That though under the Act 17 Vic. cap. 18, it was proper to produce the evidence before the Court of Appeal, the Court was not bound to use it. *Deveber v. Andrews*, 4 *All.* 626.

**Review by Court Judge granting leave to appeal.**

*See Practice V. 5 a.*

**Entry of cause on appeal paper.**

*See Practice V.*

**Review of taxation of costs.**

*See Costs IV.*

**7—Supervision of proceedings of trustees.**

*Semble*, That the Court of Equity has power to supervise the proceedings of Trustees of absconding debtors appointed under the 1 Rev. Stat. cap. 125, and to open and examine accounts adjusted by them; but it will not interfere where there is no fraud, and the proceedings of the Trustee have been regular and no special ground is stated. *Outhouse v. Hickman and others*, 1 *Han.* 38.

**Power of Court to amend pleadings in a cause—Ex parte Amendments.**

*See Amendment I.*

**SUPREME COURT OF JUDICATURE.**

**1—Jurisdiction.**

The Supreme Court of this Province has no power to declare an Act of the Provincial Legislature to be invalid; either on the ground that it interferes with private rights, and is therefore unconstitutional, or, that under the Royal Instructions to the Governor, the Act ought not to have been passed without a suspending clause. [But see *Reg. v. Chandler*, 1 Han. 548—since the passing of “The British North America Act, 1867.”] *Reg. v. Kerr*, *Ber.* 367.

*See British North America Act.)*

2 ———The Supreme Court, by virtue of the Commission under which it was constituted, may exercise the same jurisdiction in regard to the discharge of estreated recognizances in this Province, as the Court of Exchequer does in England under the Stat. 33 Hen. VIII. cap. 39; and has a general discretionary power, under that Statute to examine into the sufficiency of the reasons alleged in excuse, and to discharge a recognizance forfeited by not appearing for trial at a Court of Oyer and Terminer, and to stay proceedings on such recognizance. *Reg. v. Appleby*, *Ber.* 397.

3 ———The Supreme Court, exercising by the commissions of the Judges, the power of the Barons of the Exchequer in England, has authority to relieve against estreated recognizances, under the Stat. 33 Hen. VIII. cap. 39. *Rex. v. Morse*, *East. T.* 1826.

4 ———The Supreme Court, being exclusively a Court of Common Law, does not possess the jurisdiction of the equity side of the Court of Exchequer in England, even in revenue cases. *The Attorney General v. Baillie*, 1 Kerr 443.

5 ———The Supreme Court has the same jurisdiction as the Court of Exchequer in England, in removing from other Courts, causes affecting the rights of the Crown, or the public revenues. *Wilson v. Briscoe*, 2 All. 535.

**6—Discretionary power.**

Pending a writ of error, the Supreme Court may in its discretion allow an application to be made to the Court be-

low to amend formal errors on the record, and may suspend judgment in the mean time. Such proceeding was allowed, where the award of the *venire* and the day of trial were left blank on the record of the Court below. *Kinnear v. Gallagher*, 1 Kerr 424.

**Ordering issue to be tried.**

*See Practice XII.*

**Power to quash order for support of insolvent debtor.**

Where Justices make an order for support under the Insolvent Debtors' Act—(1 Rev. Stat. cap. 124,)—and it appears, by the examination of the debtor that he has given an undue preference to one of his creditors,—this Court has power to quash the order. *McDonald v. Watt*, 1 Han. 24.

**Crown bond—Application for relief—Summary application.**

*See Practice V. 6.*

### **SURETY.**

*See Consideration 8.—Principal and Surety.*

**Alteration of position, by subsequent agreement.**

A., with B. as surety, entered into a bond to the plaintiff, conditioned that A. should maintain the plaintiff during his life; by a subsequent agreement under seal, between the plaintiff and A., without B.'s consent, they bound themselves to refer all questions relating to the performance of the condition of the bond to two arbitrators, and to abide by their decision. *Held*, That the position of the surety was altered by this agreement, and that he was discharged from liability on the bond. *Williamson v. Steeres*, 4 All 449.

**Relief of.**

*See Principal and Surety 7.*

### **SURGEON.**

**Negligence,**

*See Action on the Case.*

**Acting as such.**

*See Evidence VI. 6.*

**SURPLUSAGE.**

*See* Action on the Case II. 3, III. 5.—Pleading I. 2, 29, 37, 39, 50.

**Reference to Plan.**

*See* Trespass II. 19.

**SURPRISE.**

*See* New Trial.—Evidence VIII. 3.

**SURRENDER.****Of lease—Purpose—New trial.**

In ejectment by a lessee against his lessor, a surrender of a lease for twenty-one years was relied on by the latter, who resumed possession at the request of the lessee in a little more than a year after the commencement of the term, paid the lessee for a fence he had erected, and afterwards built upon the land and remained in possession for about fifteen years without any claim made by the lessee; a verdict for the plaintiff on the ground that the possession was only given up for a temporary purpose, was set aside, in order that it might be again submitted to a jury, it appearing that the purpose for which it was alleged to have been given up had ceased in a short time, that the lessor had other property which could have been used therefor, and that between the time of his resuming possession, and the tenant's re-demand of it, the land had much increased in value. *Doe v. Jack*, 1 *All.* 476.

*See* Covenant 9.

**SURROGATE COURT.**

*See* Executors and Administrators.

1 ——— The decision of the Surrogate Court on all matters, properly within its cognizance, under the Act of Assembly 8 Vic. cap. 61, as relates to the executor's accounts, is final and conclusive, subject to the appeal to the Court of Chancery, except where otherwise provided by the Act; and such decision will be binding on the Courts of Law where the amount of assets comes in question, in actions brought by creditors against the executor. *Harrison v. Morehouse*, 2 *Kerr* 584.

**2—Probate Court—Granting Administration—Jurisdiction.**

The Probate Court has jurisdiction to grant administration without a citation on an estate of [a person dying in the Province, on the petition of a person alleging himself to be a creditor of the deceased, and that he died without leaving any next of kin. If administration is irregularly granted, application should be made to the Probate Court to revoke it *Doe dem Shore v. Gearon*, 1 Han. 144.

**3—Advancement—Passing accounts—Appeal—No order for distribution—Parties receiving their share—Estoppel.**

Where the intestate, in his lifetime, gave his daughter £1,000, the same was held to be an advancement which ought to have been taken into account in making a distribution of the estate. The accounts of the estate were passed before the Judge of Probates, and the Judge made his decree as follows: "I do therefore decree that there are assets in the hands of the said John Ford and Harriet Augusta Keator, to the amount of eight thousand three hundred and thirty-five dollars and seventy cents, to be distributed among the heirs and next of kin of the said John P. Ford, according to law." The appellants, by their guardian, received their share of this sum. *Held*, That the passing of the accounts was not a distribution, and the decree was not conclusive against the appellants.

In the passing and allowance of the administrator's accounts, the Judge of Probates has nothing to do with any sum advanced to any of the next of kin, because it does not form any portion of the assets of the deceased which have come into the hands of the administrators. It is not until he comes to make the distribution that any question of the advancement can arise.

*Quere*, Whether the appellants were estopped by receiving their share of the money in the hands of the administrators? *In re Ford* 1 P. & B. 551. *Price et. al., Appellants, v. Ford*.

**Fraud—Judge refusing application to sell real estate.**

*See Estoppel* I. 28. *Ex parte Simpson*.

The principles of equity are not excluded from the proceedings in the Surrogate Court in the settlement of estates. *Ibid.*

**Irregularity of proceedings—Remedy by appeal—Objection not allowed on trial.**

*See* Deed I. 40.

#### **SURVEY.**

“ Crown grant.

**Return of survey in Surveyor General's office is admissible to explain ambiguity in grant.**

*See* Evidence II. 6.

**Survey not satisfactorily ascertained.**

*See* New Trial II. 2, 27.

#### **SURVEYOR GENERAL.**

**Notice signed by surveyor General in official character—Sufficiency.**

*See* Crown Grant I. 18.

#### **SUSPENSION—(CLAIM.)**

“ Satisfaction.

**Acceptance given.**

*See* Assumpsit III. 11—Satisfaction—Action at Law VI.

**Taking bill for debt.**

*See* Bills and Notes V. 31.

**Agreement as to suspension of remedy.**

*See* Distress 2.

**Persons beyond seas.**

*See* Ejectment II. 8.

**Note payable at particular place—Necessity of presentment before recovery.**

*See* Bills and Notes VI. 12 *a*.

**Composition—Note given.**

*See* do. V. 9—Judgment I. 2.

**Bank suspending payment—Winding up—Liability of executors.**

*See* Executors and Administrators II. 13.

**TAVERN KEEPER.****Selling liquor on credit.**

*See* Bills and Notes VI. 3—Credit.

**TAXATION OF COSTS.**

*See* Costs.

**TAXES.**

*See* Assessment.

**TENANTS IN COMMON.**

1———Where persons jointly manufacture timber, which is to be divided between them, they are not partners, but tenants in common, and each has a right to dispose only of his own share. *Wiggins v. White, Ber. 97.*

2———*Quære*, Whether any, and what acts, short of the destruction of the joint property, will enable one tenant in common to sustain trespass against his co-tenant. *Ibid.*

3———If one tenant in common, with the consent of his co-tenant, sells more than his own share of the common property, he will be deemed to have acted as the agent in respect thereof, and an action for money had and received may be maintained against him by his co-tenant. *Shaw v. Grant, Ber. 110.*

4———Where two persons cut and haul timber, under an agreement that the timber is to be "got on the halves," they are tenants in common. *Kerr v. Connell, Ber. 133.*

5———One tenant in common cannot recover in assumpsit against his co-tenant, for his share of the common property, unless a sale by the co-tenant be proved. *Doyle v. Taylor, Ber. 201.*

6———The saws, water-wheel, etc., in a mill, the property of tenants in common, are a part of the inheritance, the damaging or taking away of which, except with intent to repair or replace them, is in the nature of waste, for which one tenant will be answerable to his co-tenant. *Linton v. Wilson, 1 Kerr 223.*

**Action by, money had and received—Rendering account.**

One tenant in common cannot maintain an action for money had and received against his co-tenant, for receiving

more than his share of the rents and profits of the joint property, unless there is an account settled and balance agreed upon, even though the defendant may have acted as bailiff of the other co-tenants in receiving the rents. *Frost and another v. Disbrow*, 1 *Han.* 73.

Defendant being a tenant in common with the plaintiffs, who were infants, rendered in an account, in which he acknowledged a certain sum to be due from him to the plaintiffs, as their share of the rents of the joint property which he had received; the plaintiffs' guardian disputed the correctness of the account, and claimed a much larger sum from the defendant. *Held*, in an action for money had and received, That such balance not having been agreed to, the plaintiffs were not entitled to retain a verdict for that amount. *Ibid.*

**Limitations—Adverse possession.**

*See* Limitation of Actions IV. 23, 24.

**Landlord tenant in common—Holding as tenant on new terms.**

*See* Landlord and Tenant II. 6.

**Partition.**

*See* Partition.

**Trespass—Justifying as tenant in common.**

*See* Trespass II. 26.

**Conveyance to grantor—Operation.**

*See* Deed I. 26.

**Ouster by co-tenant—Evidence of.**

*See* Evidence IV. 8, 9.

**TENANT BY COURTESY.**

**Possession of husband as tenant—Heir's right of entry.**

*See* Ejectment II. 7.

**Wife tenant in fee of land—Husband's residence—Crops raised by husband—Liability to seizure.**

*See* Execution IV. 16.

**TENANT FOR LIFE.**

The tenant of a devisee for life may after the death of



such devisee, be ousted by the remainderman without any notice to quit. *Doe dem. Fields v. McKay*, 2 Kerr 435.

### TENANT AT WILL.

1—The 29th Section of the Act 13 Vic. cap. 53, (Landlord and Tenant) does not apply to a tenancy at will. See *Ex parte Irvin*, 2 All. 519.

#### 2—Agreement to purchase—Possession under.

A person let into possession of land by the owner, under an agreement to purchase has only the estate of a tenant at will, unless there is some agreement respecting the occupation of the land before the sale is completed. *Doe dem. Cliff v. Connaway*, Ber. 382.

#### 3—Determining tenancy—Notice—Demand.

A. entered into a bond to convey land to B. his heirs or assigns on payment of a certain sum in five years: before the day of payment, A. died, having devised the land to his wife for life, and after her death, to his children, (the lessors of the plaintiff.) B. assigned his interest to the plaintiff, who paid the purchase money to the widow, and received from her a deed of bargain and sale. After the death of the widow, A.'s children brought ejectment. *Held*, That the deed from the widow to the defendant terminated any tenancy at will that might have existed, and that no notice to quit, or demand of possession was necessary before bringing the action. *Ibid*.

4—L. having been in possession of land upwards of twenty years, made a written agreement to buy it from the lessor of the plaintiff, but before the time of payment went away leaving the defendant in possession. *Held*, That under this agreement L. became tenant at will, and that such tenancy was terminated by a demand of possession made on the defendant who claimed under L., though such demand was not made on the land. *Doe v. Little*, 2 All. 558.

5—A person taking possession of land under an agreement to purchase, which specified no time for the continuance of the possession in the event of the purchase

not being completed, becomes a tenant at will; and such tenancy must be terminated by some act of the parties, before he can be ejected on non-completion of the purchase. *Doe v. Denny*, 3 All. 50.

The Act 6 Wm. IV., cap. 48, sec. 7, does not apply to such a case; but only to questions arising under the Statutes of Limitations. *Doe v. Denny*, 5 All. 50.

#### 6—**Determination of tenancy.**

A tenancy at will is determined by the entry of landlord upon the land and cutting down and carrying away wood, and making surveys without the consent of the tenant. *Doe dem. Lyon v. Slavin*, 3 Kerr 258.

7—Defendant went into possession of land as tenant at will to the lessor of the plaintiff, and remained in upwards of twenty years. Held, That the tenancy was not determined by an entry of the owner within twenty years, with consent of the tenant, to run the line between that and the adjoining land. *Doe dem. Botsford v. Tidd*, Trin. T. 1868.

8—Any act upon the land by the landlord for which he would otherwise be liable in trespass at the suit of the tenant amounts to a termination of a tenancy at will. *Ibid.*

9—*Semble*, That a conveyance of the land by the landlord to a third person, duly registered, is a determination of a tenancy at will. *Doe dem. Vernor v. McDonald*, Hil. T. 1867.

#### **Operation of writing under seal not giving tenement.**

*See* Deed V. 2.

#### **Limitation of action—Application.**

|| *See* Limitation of Actions I. 2.

10—A tenant at will cannot maintain an action against his landlord for entering upon the premises and pulling down a chimney, such an act merely determining the will. *Brewing v. Bergman*, 2 Pug 118.

Act will not be deemed wrongful if it can be referred to a right to do what he has done. *Ibid.*

**Discontinuance of owners possession—What may be considered such.**

*See* Limitations, (Statute of) IV. 16.

**TENANT FOR YEARS.****What cures as.**

*See* Landlord and Tenant II. 5.

**Tenancy—Intention.**

An agreement was made by A. and B. by mutual bonds for the sale and conveyance of lands by A. to B. on payment of a certain sum on or before the 1st of May 1829, together with lawful interest for the first three years, and eight per cent. for the last two years as a consideration for the use of the land. *Held*, That B. who was let into possession under this agreement was tenant for years until the 1st May 1829. *Doe d. Cliff v. Conaway*, Ber. 382.

**TENANCY.****Working farm on shares.**

*See* Trespass I. 19.

**TENDER.****Pleading general issue and tender to part of claim.**

*See* Pleading II. 24.

Where a justice on receiving notice of action makes a tender which is not paid into Court, and the jury find the tender sufficient, the plaintiff is not entitled to have a verdict entered for the amount tendered. *Gidney v. Dibble*, 2 Pug 387.

**Recovery of money without proof of tender of deed.**

*See* Condition Precedent 3.

**TERM.****Application to amend term in declaration in ejectment.**

*See* Ejectment V. 4.

**TERMS NOTICE.****Plaintiff's intention to proceed in cause.**

*See* Practice IX. 5, 5 a.

**Executing writ of inquiry.**

*See* Practice IX. 12.

**TERMINATION OF PROCEEDINGS****Jury ignoring bill.***See Criminal Law.***Testamentary—Capacity.***See Will.***TESTATUM.***See Execution.***TESTE.***See Execution.***TIDE.***See Crown Grant.***TIMBER.****Liability to seizure.**

If timber is cut upon crown lands, over which this Province has exercised and continues to exercise jurisdiction, it is liable to seizure here, though the territory where it is cut is claimed by the Government of Canada as being part of that Province, and license to cut timber has been granted by that Government. *Tibbitts v. Allan*, 3 Kerr 280.

**Property in whom.**

A. being indebted to plaintiff, and in consideration of further advances that might be made to him, agreed to go upon land, leased by Government to the plaintiff, and manufacture for him a quantity of timber, and raft and deliver it at a certain place in the following spring, at a certain rate per ton—A. to find all necessary supplies and to pay the men's wages; and if there should be any balance due A. on the completion of the agreement, it was to be paid to him by the plaintiff—half in cash and half in goods; and that as A. was only employed to manufacture the timber for the plaintiff at a certain rate per ton, he was not to charge A. with the tonnage or export duty, as was usual where lumberers brought timber to market on their own account. *Held*, That A. was only the servant of the plaintiff, and had no right in the timber,—the property in which vested in the plaintiff as soon it was cut;

and that the men employed by A. in getting the timber, had no lien for their wages. *Crane v. Hutchinson*, 3 Kerr 461.

#### **TIMBER LICENSE.**

*See License—Trover—Replevin.*

#### **TIME (COMPUTATION OF.)**

The day of service of the rule to plead is to be computed one of the twenty days allowed for pleading. *Cleaves v. Scoullar*, 2 Kerr 627.

**Motions when to be made—Days service—Notices.**

*See Practice IV. V.*

**Words “at least.”**

*See Practice IX. 3.*

**For purposes of Justice, Court will take notice of time of day when proceedings had.**

*See Execution I. 7, 21.*

**The words “Within three months therefrom” relate as well to cases where there has been no appearance, as to cases where defendant has appeared.**

*See Practice in Equity I. 27.*

**Time for appearance in County Court.**

*See County Court.*

#### **TITLE OF CAUSE.**

“ Affidavit II.

#### **TITLE TO LAND.**

“ Limitation of Actions—Ejectment—Dower.

**Title to land in question on trial of cause.**

*See County Court—Justice of Peace.*

**Statutory title.**

*See Evidence II. 38.*

#### **TOOLS.**

“ Distress.

#### **TOYS WHARFAGE.**

“ Wharf.

**TORT.****Waiver et.**

*See Assumpsit III. 26, 27, 41—Use and Occupation, 4.*

**Wrongful Act of cutting timber by joint tenant, property in timber becomes joint property.**

*See Joint Tenancy.*

**TRANSFER.**

“ Chattel—Delivery—Shipping Law, 6.

**TREASURER.**

“ Deputy Treasurer.

**TREASURY BOND.**

**Scire Facias—Summary application for relief.**

*See Practice V. 6.*

**TREATING.**

“ Election Law. *Herbert v. Hanington.*

**TRESPASS.**

I. REAL PROPERTY—RIGHT TO MAINTAIN ACTION—SUFFICIENCY OF TITLE—PARTY.

II. DEFENCE—PLEADING—EVIDENCE.

III. PERSONAL PROPERTY.

IV. DAMAGES.

V. ASSAULT AND FALSE IMPRISONMENT.

VI. MISCELLANEOUS.

## I.

REAL PROPERTY—RIGHT TO MAINTAIN ACTION—SUFFICIENCY OF TITLE—PARTY.

**1—Privilege—Entry necessary.**

A grant from the Crown of a privilege to build mills in the bed of a river does not convey any right in the soil; therefore the grantee cannot before actual entry in the exercise of the privilege, maintain trespass against a person for building a mill upon the place where the privilege was granted. *Frink v. Hill. East. T. 1831.*

**2—Registered deed—Actual adverse possession of defendant.**

A deed registered under the Act 26 Geo. III. cap. 8

will not enure to give possession to the grantee, so as to enable him to maintain trespass against a person in the actual adverse possession of the land, and who took possession subsequent to the registry of the deed and the entry of the plaintiff under it, and continued such possession for several years before the alleged trespass. *Dunham v. King, Trin. T. 1831.*

### **3—Unregistered deed.**

An unregistered deed transfers no property, and gives no right to enter on land. *Patterson v. Tingley, 5 All. 553.*

### **4—Entry without title—Third party—Sufficiency of possession—Judge—Jury.**

An entry by a person without title, on land in the actual occupation of another does not give him a possession to enable him to maintain trespass even against a third person. *Merritt v. Quinton, Ber. 209.*

5———Plaintiff under a claim of right, but without any title, entered on land in the actual possession of B. and—without B.'s authority—surveyed a part of the land and put up a fence thereon; the fence was pulled down and destroyed by the defendant. *Held*, That the plaintiff had not any possession of the land to enable him to maintain trespass, though no connexion was shewn between the defendant and B. *Merritt v. Quinton, Ber. 209.*

6———It is a question for the Judge, whether the plaintiff has made out a sufficient possession to entitle him to go to the jury. *Ibid.*

### **7—Division line—Parol agreement.**

Where the respective owners of adjoining lots, agree by parol to a division line, it is binding upon them, though it may differ from the line to which they had previously occupied, and one may maintain trespass against the other for an entry on a part of the land, which before the division had been in the defendant's possession. *Lawrence v. McDowall, Ber. 283.*

### **8—Glebe—Church Corporation—Rector.**

Where land is granted to a Church Corporation as a glebe, and a Rector has been duly inducted, he has the

possession, and an action of trespass for entering on the land and cutting down trees, must be brought in his name, and not in the name of the Corporation. *Rector &c. of St. Stephen v. Tortelott*, 1 Kerr 537.

#### **9—Church Corporation.**

An action of trespass for damages done to a Parish Church may be brought in the name of the Church Corporation, in the absence of proof of there being any Rector. *Rector &c. of St. George's Church v. Cougle*, 1 Han. 620.

#### **10—Vacant land—Possession—Wrong doer—Ouster**

A Crown surveyer in 1831 laid off a lot of land for A. in rear of land granted to plaintiff, intending that one lot should abut on the other; in 1833, the plaintiff had the side lines of his lot run out, and marked up to A.'s lot, under the belief that it was the rear line of his grant, and exercised acts of possession over the land, but in fact the plaintiff's grant did not extend to A.'s grant, but left a piece of vacant Crown land between them,—defendant afterwards built a camp on this piece of Crown land, which the plaintiff pulled down. In trespass for a second entry on the land and cutting trees—*Held*, That though the plaintiff had no title to the land where the trees were cut (it being outside the bounds of his grant), he had sufficient possession to maintain trespass against a wrong doer, and that the erection of the camp by the defendant was not an ouster of the plaintiff's possession. *Morrison v. McAlpin*, 1 Kerr 650.

#### **11—Master's deed—Mortgagor—De bonis asportatis.**

The purchaser of land under a sale by a master in Chancery in a foreclosure suit, whose deed is duly registered, may before entry, maintain trespass *de bonis asportatis*, for trees cut on the premises and carried away by a person claiming under the mortgagor. *Jarvis v. Edgett*, 1 All. 66.

#### **12—Entry—Defined boundaries—Possession.**

If a party enters on land, under a registered deed with defined boundaries, with the intention of taking possession



as owner, and not as a mere trespasser, he may be considered as taking possession of the whole lot described in the deed, and not merely of that part actually occupied or enclosed; and such possession if continued for twenty years, will give a title. It is a question for the jury with what intention the party entered on the land. (Per Parker, Wilmot and Ritchie, J. J.,—Carter, C. J., and N. Parker M. R., *dissentientibus*.) *Humphreys v. Helms*, Hil. T. 1861.

### 13—Continuance of possession.

A lot of wilderness land containing two hundred and forty acres, was granted to H. in 1809, soon after which he left the country. In 1812, H's father, without any authority conveyed the land to B., who conveyed to K. in 1825. K. took possession of the land, cut timber upon it, ran out one of the side lines, and in 1828 conveyed it to F. who also entered and lumbered upon it, and conveyed it to the plaintiff in 1834. The several conveyances were registered. The plaintiff cleared about an acre of the land, which was the first improvement, and commenced building a house in 1835, when the defendant, the heir of H., entered and forbade him: the house was not finished, and was burnt soon afterwards, and the land remained unoccupied till 1850, when the plaintiff built another house; after which the defendant again entered, and cut trees upon the land, for which trespass was brought. *Held*,—per Parker, Wilmot and Ritchie, J. J.,—Carter, C. J., and N. Parker, M. R., *dissentientibus*,—That the jury were properly directed, that if the plaintiff, and those under whom he claimed, entered under registered deeds with defined boundaries, with the intention of taking possession as owners of the land, and not as mere trespassers without any claim of title; they might be considered as having taken possession of the whole lot, and not merely of that part actually occupied; and that such possession, if continued for twenty years, would bar the defendant's right. *Humphreys v. Helms*, 5 All. 59.

### 14—De bonis Asportatis.

Though plaintiff is not in possession of land, if he has

the title he may, since the Act 21 Vic. cap. 20, sec. 5, maintain trespass *de bonis asportatis* for carrying away trees from it. *Ibid.*

**15—Mortgagee — Execution against mortgagor — De bonis asportatis.**

A mortgagee in fee of land, who is not in possession cannot maintain trespass *de bonis asportatis*, against the Sheriff for seizing, under an execution against the mortgagor, logs cut by him with the mortgagee's permission,—no delivery of the logs having been made to the mortgagee. *DesBrisay v. McPhelim*, 5 All. 327.

**16—Joint liability—Common Purpose—Several defendants—Separate trespasses.**

In trespass against several defendants if they go upon the land with a common purpose they are jointly liable though the acts of trespass are separate and are committed on different parts of the land. *Ferguson v. Savoy*, 4 All. 263.

**17—Crown right—Escheat—Reasonable use of water—Devise.**

A., by will executed in 1824, devised lot No. 11 to his son G., except one hundred acres, which he gave to other children, and he likewise gave to his son D. the privilege of keeping a saw-mill where it then stood, with a log and lumber yard, without molestation or hindrance; but not to dispose of the said mill privilege to any person except his brother G., or his liberty; and all the remainder of said lot No. 11, to remain and to be to his son G., with the above exception. G. died in 1840, having devised all his property to his sons, one of whom was the plaintiff. The plaintiff's property was escheated in 1852, and partition made between the Crown and the other heirs of G., by which the saw-mill, with the log and lumber yard adjoining and the privilege of water for the use of the mill, were awarded to D., to hold according to the will of A. The Crown afterwards granted its portion of the land to plaintiff, excepting the saw-mill with the log and lumber yard adjoining, and the use of the water for the mill, as awarded to D. in the

partition. D. died in 1861, and devised the saw-mill and privilege to the defendant. The plaintiff had a fulling-mill on the land granted to him by the Crown. The fulling-mill and the saw-mill were supplied with water from the same aqueduct. Both mills could not be worked at the same time, and when the fulling-mill was in operation, the water was diverted from the saw-mill by an opening in the aqueduct. *Held*, in trespass for taking possession of the saw-mill, injuring the gates and diverting the water from the fulling-mill—1st. That if the will of A. gave D. only a life estate in the saw-mill, the plaintiff had no right, as any interest he might have had as one of the heirs of A., was escheated to the Crown, and excepted out of the grant to him. 2nd. That in such case the defendant, as one of the heirs of A., would have an undivided interest in the saw-mill with the Crown, and not with the plaintiff. 3rd. That if, in diverting the water from the fulling-mill, the defendant did no more than was necessary for the reasonable use of the water for the saw-mill, the plaintiff could not recover for that act, and that such question should have been left to the jury. *Pickett v. Pickett*. 1 *Han.* 156.

**18—Expulsion—Part of close.**

Expulsion of plaintiff from part of the close is sufficient to sustain the count for expulsion. *Gesner v. Cairns*, 2 *All.* 653.

**19—Joint occupation—Working farm on shares.**

A person working a farm on the shares and occupying part of the house jointly with the owner of the farm, has not such a tenancy as to prevent the owner from maintaining trespass to the land. *West v. Atherton*, 2 *All.* 653.

**20—Possession—Sufficiency of.**

To maintain trespass, the plaintiff's possession should have the characteristics of the possession of a permanent owner, shewn by acts done with the apparent object of taking possession as owner,—mere casual acts of a transient or temporary nature few in number and occurring at long intervals, are not sufficient. *Gidney v. Bates*, *Mich. T.* 1862.

**21**———The *locus in quo* was a small uncultivated island and the acts of possession relied on were fastening plaintiff's net to a tree on the island annually for about twenty years; collecting drift wood upon it, and once putting a calf there to pasture,—*Held* insufficient. *Ibid.*

**22—Entry—Intention—Deed—Acts of possession.**

There is a distinction in the character of the possession where a person enters on land under a registered deed, and where he goes in without any claim at all. It should be left to the jury to say whether a person entered on land with the intention of taking possession under his deed, or, as a mere trespasser—the mere fact of a person having a registered deed of land, does not give him possession of the land described, without shewing acts of possession. *Governor, etc., of the Madras Board v. Ryan, Mich. T. 1861.*

**23—Possession—Sufficiency of.**

The *locus in quo* was the rear part of a lot of wilderness land granted to A. in 1799, in a grant containing a number of other lots severally, each described by particular bounds and lines. It was proved that the plaintiff's father was in possession of the front of the lot in 1821, that he built upon and improved it, and that in 1838 he had the dividing line between that and the adjoining lot marked nearly to the rear, that his right was never disputed, and that he died in possession, and devised all his property to the plaintiff, who continued the same possession. No conveyance was shewn from A., or that he had ever been in possession of the lot, or what became of him. *Held*, per Carter, C. J., and Wilmot, J.. That the plaintiff had not shewn a sufficient possession, either actual or constructive, of the rear of the lot, to maintain trespass even against a wrong doer, and that a conveyance from A. to the plaintiff's father could not be presumed. *Gaudin v. McKilligan, 2 All, 392.*

*Held*, per Parker, J., and Street, J., That in the absence of evidence of a wrongful entry, it might be presumed that the plaintiff's father entered by permission of the grantee, and, there being no adverse possession, his possession would be presumed to extend over the whole lot, as one un-

divided close. *Held* also, That as the defendant did not claim the land under any right derived from the grantee, but as being part of another grant in rear, and the question was the boundary line between the two grants, he was not entitled to put the plaintiff to proof of a documentary title. *Held* also, That the running the line in 1838 was an act of possession of the whole lot. *Gaudin v. McKilligan*, 2 *All.* 392.

**24—Prior possession—Title.**

A person taking possession of land without title, cannot maintain trespass against one who has a prior possession of the land under a Crown grant, and with lines run according to the grant; even though it conveys no title in consequence of the land having been previously granted. *Creamer v. Whipple*, 3 *All.* 273.

A defendant in possession under such circumstances, is not bound to prove a title under his grant, as the plaintiff acquires no possession. *Ibid.*

*Semble*, That a person who takes possession of part of a lot of land without title, does not by running the exterior lines of the lot, acquire such a possession as will enable him to maintain trespass for an entry on the line beyond the bounds of his actual occupation. *Ibid.*

**25—Asportavit — Sufficient title to recover upon—Place.**

In trespass for breaking and entering a close and cutting the grass, the plaintiff failed to prove any parish in which the *locus in quo* was situated. *Held*, That being in possession, he had nevertheless sufficient title to the grass to enable him to recover on the *asportavit* count for taking it away, against any person who could not prove a title to the land on which it was cut. *Moran v. Laird*, 3 *Kerr* 403.

**26—Possession — Absence of proof of better title—Wrong doer.**

In trespass for cutting trees, the plaintiff relied on his possession of the land from which they were cut, which was proved to have been called a glebe lot for upwards of

twenty years, and had been surveyed by direction of the Church corporation of the parish. *Held*, That in the absence of proof of any title in the corporation, or any lease from them to the plaintiff, that he was entitled to recover against a mere wrong doer. *Hodgson v. Carr*, 3 *Kerr* 499.

**27—Owner of land—Life estate—Asportavit.**

The owner of land, subject to an estate for life, may maintain trespass *de bonis asportatis* for carrying away trees which have been wrongfully cut upon the land. *Alexander v. Hartt*, 1 *Han.* 161.

**28—Licensee.**

A license granted by the government to cut timber on Crown land, gives the licensee no interest in the land; therefore he cannot maintain trespass under the Rev. Stat. cap. 133, against a person for entering on the land, and cutting down and taking away the trees. *Breckenridge v. Woodner*, 3 *All.* 303.

**29—Grantee—Water privilege—Easement.**

A deed granting all the right, title, interest, etc. of A. in and to the "water privilege" of a piece of land, conveys only an easement in the land, and no interest in the land itself; therefore the grantee cannot by virtue of the deed maintain trespass for an entry on the land. *Wilson v. Sinclair*, 3 *All.* 343.

In trespass by W. being in possession, claiming under the deed, the jury were directed that he was in possession of the land by virtue of the deed. *Held*, a misdirection. *Ibid.*

*Quere*, Whether if the case had been left to the jury on the question of possession alone, and they had found for the plaintiff, the Court would have interfered. *Ibid.*

**30—Insufficient possession—Evidence. :**

The plaintiff in trespass claimed under a registered deed from K., who had been in possession of the land, but was not actually so at the time of giving the deed, and it was not shewn how he got possession, or how long he held

it; the land had been unfenced for several years before, and the plaintiff had never occupied it, or taken possession. *Held*, That he had neither the actual or constructive possession, and could not maintain the action. *Creelman v. Atkinson*, 3 *All.* 450.

**31—Color of title—Possession against wrong doer.**

In trespass *quare clausum fregit*, it appeared that the land which was principally wilderness, had been granted to a person who resided out of the country; that one T. or his agent had a charge of the land to prevent trespasses on it, and also had a power of attorney authorising him to sell it, and that, after the death of the grantee, T. believing that the authority continued, conveyed the land to the plaintiff who had the lines of it run out by a surveyor and exercised acts of ownership over the land by cutting timber. *Held*, That though the plaintiff acquired no title to the land by his deed, he went in under colour of title, and had sufficient possession to entitle him to recover against a mere wrong doer who entered on the land and cut timber after the plaintiff took possession and ran out the lines. *Nugent v. Parks*, 6 *All.* 391. See Limitation of Actions.

II.

DEFENCE—PLEADING—EVIDENCE.

**1—Right of soil—River—Easement.**

An easement or privilege granted by deed, to turn the water of a river for the use of mills, and to build mill-dams, does not convey the right of soil, and cannot be given in evidence under the general issue in trespass. *Wallace v. Milliken, East. T.* 1831.

**2—Fence—Breaking—Cattle entering.**

Defendant threw down a fence and entered on land in the plaintiff's possession claiming it to be a highway, and in consequence of the fence being thrown down, the defendant's cattle went in upon the plaintiff's field. *Held*, That this was not a—"breaking into a field under lawful fence"—by the cattle, and therefore that a Justice of the Peace

had no jurisdiction to proceed against the defendant in trespass under the Act 1 Wm. IV. cap. 9, sec. 6. *Colwell v. Purdy, Trin. T.* 1831.

**3—Admission—Killing ox—Consent.**

An admission by the defendant that he had killed the plaintiff's ox and ought to pay for it, will not support an action of trespass for taking the ox, there being some evidence that the ox had been worked by the defendant, by consent of the plaintiff's agent. *Bransfield v. Bishop, Ber.* 89.

**4—Entry to remove timber—Necessary evidence.**

A man cannot justify an entry on the land of another for the purpose of taking his own property, unless he shews that it was upon the land without any fault or neglect on his part; therefore in trespass *quare cl. fregit*, a plea justifying the entry for the purpose of removing the defendant's timber which had been carried there by a sudden rise of water in the river in which it was being floated to market, is bad, because it does not shew that the defendant was not in fault, by endeavouring to prevent the timber from floating on the plaintiff's land. *Read v. Smith, Ber.* 173.

**5—Entry—Command—License.**

A defendant in trespass may justify his entry by the *command* of the owner of the freehold, but not by his mere permission or license; therefore where the plaintiff proves a trespass by the defendant on land in his (plaintiff's) possession, it will be no justification to the defendant to shew that the title was in a third person, from whom he had agreed to purchase it, and under which agreement he went into possession. (*See Robinson v. Vaughton*, 8 C. and P. 252.) *Parent v. Corneilson, Ber.* 235.

**6—**—In trespass *quare cl. fregit*, if defendant justifies the entry on the land under a third person he must shew that he entered by the *command* and under the *authority* of such person, not merely that he allowed the defendant to enter. *Keen v. Seymour, Hil. T.* 1864.

**7—Entry on ground opposed to title as mortgagee—Setting up mortgage.**

In trespass, where the question in dispute was the



dividing line between the plaintiff's and defendant's land the defendant, among other grounds of defence, relied on a mortgage given to him by the plaintiff before the alleged trespass upon the lot occupied by the plaintiff. *Held*, That as the defendant had entered on the land upon a ground opposed to his title as mortgagee, it afforded no justification of the trespass. *Merrithew v. Sisson*, 3 Kerr 373.

**8—Joint trespassers—Separate trespasses.**

Where there are a number of defendants in an action of trespass, and plaintiff proves an act of trespass against some and not against all, and then goes on to prove another act against others of defendants not implicated in the first act proved, he must be taken to have abandoned the first act and be confined to the last act proved. *Maloney v. Purden*, 3 Kerr 515.

*See Nos. 12, 13, 25.*

**9—Several defendants—Joint liability.**

In trespass against several defendants, if they go upon the land with a common purpose they are jointly liable, though the acts of trespass are separate and are committed on different parts of the land. *Ferguson v. Savoy*, 4 All. 268.

**10**———If two persons enter on land wrongfully and cut down trees separately, but unite in taking them away, by removing obstructions in the roads, they are jointly liable for the taking and carrying away, but not for the cutting. *Keen v. Seymour*, 6 All. 44.

**11—Verbal command by mortgagee not in possession.**

In trespass for cutting and carrying away trees off land in the plaintiff's possession, defendant may justify under a verbal command to enter and cut, given by a mortgagee of the land not in possession. *Carson v. Griffin*, 5 All. 244.

**12—Joint trespass—Separate—Abandonment.**

In a joint act of trespass, if the plaintiff wishes to rely on a separate act of trespass by one of the defendants, he must abandon the joint trespass; he cannot ask the jury to find in the alternative. *Lawton v. Adams*, 5 All. 274.

**13—Abandonment—Judge—Discretion.**

In an action against several defendants, the plaintiff proved acts of trespass on the 6th June, in which all the defendants were concerned, and another act of trespass on the 10th, in which only one of the defendants present on the 6th took part; the plaintiff then elected to proceed for the first trespass proved. *Held*, That this was a matter in the discretion of the Judge; and that the plaintiff by giving evidence of the trespass on the 10th June, had not abandoned the previous one proved. *Ache v. Alexandre*, 6 *All.* 522. (*See* 8. 25).

**14—Entry to retake cattle wrongfully taken.**

In trespass for breaking and entering plaintiff's barn, defendant justified on the ground that his cattle had been wrongfully taken by the plaintiff, who locked them up in his barn, and refused to give them up. *Held*, Sufficient, and that defendant had a right to take his cattle from the plaintiff, who was a wrong doer. *See* *Blades v. Higgs*, 7 *Jur. N. S.* 1289). *Graham v. Green*, 5 *All.* 330.

**15—Deed—Registry—Relation.**

In trespass *quare cl. fregit* for cutting grass on the 31st July, the plaintiff proved possession only; the defendant justified as owner of the land under a deed dated the 15th July, but not registered till the 1st August. *Held*, That as against the plaintiff the defendant had not title by relation from the date of the deed. *Patterson v. Tingley*, 5 *All.* 553.

*See* Relation 4.

**16—Liberum tenementum—Proof—Close.**

In trespass *quare cl. fregit* describing the close by abutments, the defendant pleaded *liberum tenementum*. *Held*, That under this plea, he was bound to prove that that part of the close described by abutments on which he entered, was his soil and freehold, and that, having failed to prove title to a small piece of the land so described, on which part of the trespass was committed, the plaintiff was entitled to a verdict. *DesBrisay v. Livingstone*, 6 *All.* 169.

**17—Crown grant—Possession—Question for jury.**

Defendant in trespass claimed the *locus in quo* under a grant from the Crown, the plaintiff gave evidence of acts of possession of the land for twenty years prior to the grant by which he claimed that the Crown was out of the possession, and could not grant without office found. *Held*, That this evidence of possession ought to have been left to the jury. *Smith v. Morrison*, 1 *Pug.* 200.

**18—Church corporation—Members' rights.**

In trespass for boarding up the doors and windows of a parish church, the defendants justified as church wardens, and that they had closed the church for repairs, but the evidence shewed that they had closed it to prevent a clergyman who claimed to be rector, from officiating. *Held*, In the absence of proof that there was any legally appointed rector. That the defendants had no right to dismantle the church as against the church corporation, even though they were themselves members of it. *Rector etc. of St. George's Church v. Cougle*, 1 *Han.* 609.

**19—Admission by plea—Plan—Lot.**

In trespass the declaration described the premises as four closes in the city of St. John, fronting on Elliot Row, and known and distinguished on the map or plan of the city on file in the Common Clerk's Office as lots Nos. 294, 295, 296, 297—plea—not guilty—"so far as relates to the said close No. 295 in the declaration mentioned"—and as to the other closes, payment of money into Court. *Held*, That the plea admitted the identity of the lot, and therefore evidence of the plan filed in the Common Clerk's Office was unnecessary *Seemle*, That as the number of the lots corresponded with the grant of the lots, which was in evidence, the reference to the plain was surplusage. *Merritt v. Corvett*, 2 *Kerr* 385.

**20—Property delivered to avoid execution.**

In trespass for taking hay, which plaintiff claimed to have been delivered to him by defendant in payment of a debt. *Held*, That evidence was admissible on the part of the defendant, to shew that the hay was delivered to plain-

tiff in order to prevent its being seized on execution against defendant, and that no property was intended to pass to the plaintiff. *Knowles v. Adams*, 5 All. 445.

**21—Unregistered deed—Command—Entry.**

In trespass defendant pleaded freehold in P. by whose comand he entered. *Held*, That an unregistered deed of release from P. to defendant was not evidence of such command. An unregistered deed transfered no property, and gives no right to enter on land. *Patterson v. Tingley*, 5 All. 558.

**22—Distress for rent—Keeping and detaining in satisfaction for rent.**

It is a good plea for a declaration in trespass for taking goods, that the goods were restrained for rent and not being replevied within five days were appraised, and after such appraisement kept and detained in satisfaction of the rent; although the defendant should have proceeded to sell the goods, yet the omission to do so will not enable the owner to maintain trespass, the original taking being lawful. The option granted by the Act 50 Geo. III. cap. 21, sec. 7, to bring trespass or case, is to be understood according to the subject matter of the grievance, and not the mere election of the party. *Rogers v. Buntin*, 2 Kerr 280.

**23—Tenancy—Right to crops.**

In trespass for taking hay and grain, it was proved that the land on which they grew belonged to the plaintiff's father. who, four years before the trial, gave it up to the plaintiff on condition that he should support his father and family; that the father continued to live on the land, but that the plaintiff took the management of the farm and sowed the grain and cut the grass. *Held*, That the jury were properly directed that this constituted a tenancy and gave the plaintiff the possession of the crops. *Ferguson v. Savoy*, 4 All. 268.

**24—Locus in quo—Highway.**

To an action of trespass *quare clausum fregit*, the defendant pleaded that the *locus in quo* had been laid out and recorded as a road three rods wide. *Held*, That the proof of

such laying out and recording would not sustain a justification depending upon the fact of the place being a public highway, the Act of Assembly requiring that no public highway should be laid out of a less width than four rods.

*Perley v. Dibblee*, 1 Kerr 514.

**25—Separate trespasses — Evidence — Abandonment—Necessity of.**

In trespass against three defendants for taking away logs, which taking occupied several successive days, the plaintiff proved a joint trespass against all the defendants during the first two days, after which one of the defendants went away; a verdict having been found against the other two. *Held*, That the trespasses were not so separate and distinct as to require the plaintiff to abandon the joint trespass before giving evidence of the trespass by the two defendants. *Atkinson v. McAuley*, 4 All. 243. See sec. 12, 13.

*Quere*, Whether where the two defendants are clearly liable, the evidence of the trespass by the three, is ground for a new trial. *Ibid*.

**26—Denial of title—Claim—Justification—Evidence.**

On a verdict in trespass for the plaintiff, claiming title by descent from his father, the Court refused a new trial moved for on the ground that S., one of the defendants, was the plaintiff's brother and therefore justified in entering as a tenant in common with the plaintiff: the defence at the trial being a denial of the father's title, and a claim under a different right. *Sears v. Palmer*, 3 All. 400.

*Quere*, Whether if the father's title had not been denied the verdict would have been good against the other defendants on the plaintiff entering a *nol pros.* as to S., he being a party to all the alleged trespasses. *Sears v. Palmer*, 3 All. 400.

Defendant in trespass offered as evidence of title a registered deed to himself from one who had neither actual or constructive possession of the land. *Held*, That this deed was properly rejected. *Ibid*.

**27—Possession—Insufficient evidence.**

The defendant in an action of trespass justified under A.,

and in order to show title to him, offered evidence of a conversation between A. and B.,—not made upon the land, but several miles distant from it,—in which A. gave B. permission to build a mill on the land in dispute. B. built the mill more than twenty years before the action, but did not further recognize A.'s right to the land. *Held*, That this was not sufficient evidence of A.'s possession, and that the justification was not proved. *White v. Smith*, 4 All. 1335.

**28—Extent of possessions—Unregistered deed—Evidence.**

The acts of a near relative and personal representative of a deceased person, done in behalf of his minor children and heirs upon and in regard to land which was claimed by the deceased, but under a defective title, will enure to the benefit of such heirs, to shew possession in them, as against a mere wrong doer, and the title deed, though not sufficient to convey the land for want of due registry or livery of seisin, may be used to shew the extent of the claim of possession. *Hadden v. White*, 2 Kerr 634.

**29—Boundary—Necessary evidence.**

In trespass, the plaintiff claimed title under a grant and survey made in 1823; the defendant claimed the same land under a prior grant to D., and conveyance from P. to E., and from E. to himself, made in 1834, under which he entered. *Held*, That though no conveyance was shewn from D., the original grantee, the defendant was not a mere wilful trespasser, and that the plaintiff could not recover on his possession alone, but was bound to prove that the line contended for by him was the true boundary between his grant and the grant to D., and that the question of boundary should have been submitted to the jury. *Baldwin v. Braydon*, 3 Kerr 169.

**30—Highway—Ploughing soil.**

In trespass to land, and ploughing up the soil, the defendant pleaded that there was a public highway over the land, by reason whereof he entered. *Held*, That if it was a highway the defendant was not justified in ploughing up the soil. *Cole v. Maxwell*, 3 All. 183.

**31—Cattle—Defect of fences.**

In trespass by cattle, if the defendant justify the entry of the cattle through defect of fences, it must be specially pleaded. *Griswold v. Hallet, Mich. T. 1834.*

**32—Adoption of acts—Presumption.**

By Act 10 Vic. cap. 72, incorporating the South Bay Boom Co., amended by 11 Vic. cap. 49, and 17 Vic. cap. 52, though timber placed within the Booms is under the general control and direction of the Company, it is under the immediate charge of the owners, to be fastened and secured by them, and at their risk; therefore the Company is not liable in trespass where rafts are fastened to trees on the shore of land within the limits of the Boom, unless the act was done by the Company or their servants, or with their knowledge and consent; or, if done by other persons, —unless the Company has adopted the act. The mere fact that the Company is entitled to boomage on all lumber coming with the boom, does not raise any presumption that the lumber was fastened in a particular place by their direction; nor is the receipt of boomage an adoption of the act of the owners of lumber in fastening it to the land of a riparian proprietor. *Dever v. South Bay Boom Co., 1 Pug. 109.*

**33—Company—Contractors under—Liability.**

The defendants, a Railway Company, being authorized by Act of Assembly to construct a line of railway, entered into a contract with A. and B. for that purpose. The contractors, in order to get ballast to complete the road, laid down a track across the plaintiff's land, leading to a gravel pit, and used it for the transportation of gravel to the railway. *Held*, That the defendants were not liable for the acts of the contractors, the trespass having been committed without their authority, and being merely collateral to the work which they had agreed with A. and B. to perform. *Payne v. Fredericton Railway Co., Mich. T. 1871.*

**34—Entry by permission of agent—Cutting lumber.**

Defendant had a license from the Crown to cut lumber n rear of land granted to the plaintiffs. The plaintiff's

agent and manager in charge of their land pointed out to the defendant a line as the boundary of the plaintiff's land, and directed him not to cut over it. The defendant cut lumber up to this line, believing it to be correct; but it was shewn by another survey that the line so pointed out to the defendant was incorrect, and that part of the lumber was cut upon the plaintiff's land. *Held*, That the defendant having entered on the plaintiff's land and cut the timber by permission of their agent, was not liable in trespass for the cutting, though the agent had no authority to agree to a boundary affecting the plaintiffs' title to the land. *Vernon Mining Co. v. Prescott, East. T. 1871.*

### 35—Forcible entry by owner—Possession—Plea—Justification.

Where the defendant was the owner, and entitled to the immediate possession of a dwelling house occupied by the plaintiff's wife, who detained it, after demand, by refusing to give it up and locking the doors against the defendant's entry. *Held*, by a majority of the Court, (Allen, C. J., Fisher and Wetmore, J. J., Weldon and Duff, J. J., dissenting,) That the defendant was justified in forcing open the door so locked,—entering and taking possession of the house, and had thereby obtained such a lawful possession of it, as proved the allegation in his plea of justification, viz.: "That he was in possession of the dwelling house." *Napier v. Ferguson, 2 P. & B. 255.*

## III.

### PERSONAL PROPERTY.

#### 1—Tenant in common.

*Quere*, Whether any and what acts short of the destruction of the joint property, will enable one tenant in common to sustain trespass against his co-tenant. *Wiggins v. White, Ber. 97.*

#### 2—Sheriff *fi. fa.*—Taking goods.

A Sheriff is liable in trespass for taking goods under a *fi. fa.* which had been once returned and re-issued as an alias. *Johnson v. Winslow, Ber. 53.*



**3—Abusing authority—Trespasser ab initio.**

Where a person having authority by a Statute, abuses such authority by some positive act contravening the same, he will be liable as a trespasser *ab initio*. *Califf v. Wilson*, Ber. 79.

**4—Agreement—Violation.**

Where personal property of the defendant is in the actual possession of the plaintiff under an agreement between them, the latter may sustain trespass against the former for taking it away. *Holmes v. Clark*, Ber. 87.

**5—Satisfaction—Judgment—Sheriff.**

Plaintiff brought an action against the Sheriff for taking his goods on an execution against A. and recovered judgment, but not to the full extent of his claim, the jury having found that part of the goods did not belong to the plaintiff and were consequently liable to seizure under the execution. Plaintiff afterwards brought trespass against the defendant who had indemnified the Sheriff for seizing the goods. *Held*, That the judgment against the Sheriff was a satisfaction for the wrong done to the plaintiff by taking the goods, and that he could not recover. A party cannot split up his claim for damages and proceed for a part of the trespass at one time, and part at another. *Lawton v. Adams*, 5 All. 274.

**6—Master and servant—Relation.**

Plaintiff was Chairman of the Board of Agriculture, to superintend the erection of a Provincial Exhibition; plaintiff had contracted to erect the building, but failed to complete it in time, and the committee took possession of it in order to finish it. He left some boards on the ground, which it was necessary to remove before the opening of the Exhibition. Two days before that time, one W. sold the boards, and they were taken away. W. informed the defendant that he had sold the boards, who said it was the best thing to do. *Held*, That the jury were justified in finding that the relation of master and servant existed between the committee and W., and that the sale of the boards was an act done by W. in the course of his employment. *McKay v. Botsford*, 5 All. 550.

## IV.

## DAMAGES.

**1—Special Allegation—Expense of inquiry.**

In trespass for taking goods under an execution the declaration alleged as special damage, loss of time and expenditure of money in recovering the possession. *Held*, That under this allegation, plaintiff could not recover the expense of an inquiry held by the Sheriff for his own information as to the right to the goods, and *quære*, whether such damage could be recovered in any case. *Wilson v. Eells*, Ber. 325.

**2—Judge directing for small damages for plaintiff—Verdict for defendant—New trial.**

In trespass *quare cl. fregit* the main question was the dividing line between the parties, on which the evidence was clearly in favour of the defendant; but he had driven a few stakes on plaintiff's land, for which the Judge directed a verdict for the smallest amount of damages; the jury, however, found for the defendant, and the Court refused a new trial. *O'Flaherty v. Devine*, Hil. T. 1863.

**3—Wilful and malicious trespass—Certificate—Damages.**

In trespass against several defendants, the plaintiff had forbidden them from going on his land, and again, after acts of trespass had been committed, notified them to desist, whereupon two of them did so. At the trial plaintiff elected to proceed against all the defendants, and, under the Judge's direction, only recovered for the trespass committed before the two defendants left, amounting to \$2. *Held*, That plaintiff was entitled to the certificate of the Judge; that the trespass was "wilful and malicious." *McMillan v. Fairly et al.*, 1 Han. 500.

**4—Damages when held not excessive.**

In trespass for cutting a net with which the plaintiff was fishing in a public navigable river, where the defendant claimed an exclusive right to fish, as owner of the adjoining land, the jury gave a verdict for \$40. *Held*, That the damages were not excessive, though the plaintiff stated

the actual damage to the net did not exceed \$2. *Rose v. Belyea*, 1 *Han.* 109.

**5—Conflicting evidence.**

Where in trespass there was conflicting evidence as to the quantity and value of trees taken from plaintiff's land, the Court refused to disturb the finding of the jury, even though the damages appeared large. *Prescott v. Walton*, 2 *Han.* 280.

**6—Distinct lots—Title to one in defendant—No apportionment of damages.**

Where in an action for trespass on two distinct lots of land, to one of which the defendant proved title, the jury gave a verdict for the plaintiff without any apportionment of the damages, the Court ordered a new trial, unless the plaintiff consented to accept nominal damages. *White v. Smith*, 4 *All.* 885.

**7—Splitting claim.**

A party cannot split up his claim for damages, and proceed for a part of the trespass at one time, and part at one time, and part at another. *See Supra* III. 5.

**8—Special damage—Claim for—Notice of action.**

*See Action at Law* XI. 5 *a.*

**Action against Justice of the Peace—Nominal damages.**

*See New Trial* III. 18 *a.*

**Illegal distress—Damages.**

*See Distress* 9.

**Protection of Justices—False imprisonment—Two pence damages.**

*See Justice of Peace* III. 7.

V.

ASSAULT AND FALSE IMPRISONMENT.

**1—Assault and battery—Felony.**

Where, in an action for assault and battery, the plaintiff proves that the injury caused grievous bodily harm, and therefore amounted to a felony under 1 *Rev. Stat. cap.* 149,

sec. 15, the plaintiff will be non-suited unless it appears that proceedings have been taken against the defendant for the criminal offence. (But see *Wells v. Abrahams* 7 L. R. Q. B. 554.) *Schohl v. Kay*, 5 All. 244.

*See Criminal Law.*

**Assault on Public Officer—Damages held not excessive.**

*See New Trial* III. 18.

## **2—Justice of the Peace—Proceedings—Jurisdiction;**

A Justice of the Peace is liable in an action for false imprisonment if he commits a person for trial who is brought before him on a criminal charge, without taking an examination respecting the charge, as required by law. An examination taken beyond the jurisdiction of the Province is a nullity. *Nary v. Owen*, *Ber.* 877.

## **3—Commitment—Place—Damages.**

In trespass for false imprisonment against Justices of the Peace who had exceeded their power in committing the plaintiff for contempt to an improper place of imprisonment, but who otherwise had received no greater punishment than he was liable to by law, the Judge offered to direct a verdict for nominal damages, which the plaintiff refused, claiming substantial damages—whereupon the Judge ordered a non-suit—the Court refused to set the non-suit aside. *Armstrong v. McCaffrey*, 1 *Han.* 517.

*See also Justice of Peace* III. 7. *Smith v. Summers.*

## **4—Information—Omission of Christian name—Subsequent insertion.**

An information was sworn before the defendant, a Justice of the Peace, of the commission of an alleged offence by — Garrison (the Christian name being omitted); the defendant afterwards filled in the plaintiff's Christian name, and issued a warrant against him, on which he was arrested. *Held*, That the warrant was void, and the defendant liable in trespass. *Garrison v. Harding*, 1 *Pug.* 166.

## **5—Damages—Excessive fine—Imprisonment.**

In trespass against Justices of the Peace for false imprisonment, it appeared that the plaintiff, having commit-

ted an assault, was convicted by the defendants under the 1 Rev. Stat. cap. 159, sec. 27, and fined £8, and, in default of payment, sentenced to a month's imprisonment, and that, having refused to pay the fine, he had been imprisoned for a month. *Held*, That as the imprisonment did not exceed that assigned by the Act for the offence, the plaintiff was only entitled to recover *two pence* damages under 1 Rev. Stat. cap. 129, sec. 11, though the fine was greater than the Justices had power to impose by the Act. *Davis v. Raymond*, 6 All. 317.

**6—Public officer—Execution—Delivery.**

A commissioner of highways, who, in the discharge of his duty, procures the conviction of a person for neglecting to perform statute labor, does not make himself a trespasser by delivering an execution, issued by the Justice, to a constable, and telling him that if the defendant was arrested he thought he would pay,—the defendant being afterwards arrested under the execution, which was defective. *Craig v. Giberson*, 2 All. 207.

**7—Party suing out process—Directions—Validity on face—Justification.**

A party who merely sues out a process and delivers it to an officer to execute, is not liable as a trespasser, though he may be liable to an action on the case if there are not previous proceedings to warrant the process. *Carter v. Purrington*, 2 All. 226.

If he gives special direction to the officer or takes part in the arrest, he is liable in trespass unless there is a regular judgment to authorize the execution. *Ibid*.

A process regular on its face, is a justification to the officer. *Ibid*.

**Commitment by Justice—A Justification.**

*See* Justice of Peace IV. 26.

**8—Justice of the Peace—Second execution.**

A Justice of the Peace is not liable to an action of trespass for issuing a second execution for a balance due upon a judgment recovered under the Act 4 Wm. IV. cap. 45, before the first execution is returned—the matter being

within the Justice's jurisdiction. *Stewart v. Hazen*, 2 All. 254.

Such an execution may be irregular, but is not void. *Ibid.*

#### **9—Defective conviction and warrant.**

Where a Justice of the Peace has jurisdiction to try a complaint, and there has been a regular information, but the conviction and warrant of commitment are defective, he is not liable in trespass for anything done prior to the conviction. *Sewell v. Olive*, 4 All. 394.

#### **10—Justification—Reasonable and probable cause.**

Application having been made to the defendant, a Justice of the Peace, for a warrant to summon jury to determine on the necessity of a private road through the plaintiff's land, he issued a warrant under which a jury was summoned, but were unable to agree upon the amount of damages to the plaintiff. Another application was made, and another warrant issued by the defendant, under which a second jury was summoned to determine upon the road, but having been resisted by the plaintiff in entering on his land, and threatened with injury if they did so, one of them made oath before the defendant that the plaintiff "had molested the jury" in the discharge of their duty; whereupon the defendant issued a warrant against the plaintiff, on which he was arrested and detained several hours. *Held*, That though the entry on the plaintiff's land under the warrant might not have been justifiable, in consequence of irregularity in the proceedings, there was no want of *bona fides* in the defendant, and that he had shewn reasonable and probable cause for what he did. *Stiles v. Brewster*, 4 All. 414.

#### **11—Constable—Duty—Execution.**

A constable is liable in trespass, if he arrests a debtor under an execution issued out of a Justice's Court, (1 Rev. Stat., cap. 137) before he has used reasonable diligence to find goods to levy on. *Hunter v. Maddox*, 1 Han. 162.

#### **12—Legal adviser—Aiding—Imprisonment illegal.**

Procuring, commanding, aiding or assisting in a tres-

pass makes a person a trespasser ; and it affords no defence to one who has been instrumental in procuring or promoting the imprisonment of another, under a warrant of a magistrate, that he was merely the legal adviser of the magistrate, the imprisonment itself being illegal. *Thompson v. Hatch*. 2 Kerr 425.

### **13—Constable—Assault against and rescue.**

T., a constable, having arrested L., the latter paid the amount of the execution, less the constable's fees. T. demanded his fees, whereupon L. knocked him down. S. and D. hearing the noise went into the office where S. and L. were and put T. out of the building. They knew that T. was a constable, and that he was there to execute the writ. *Held*, in an action against S. and D. for assault and rescue, that T. had a right to go into the office to execute the process ; that he was entitled to his fees, and to the custody of the prisoner until they were paid ; and that the disturbance having been caused by L's wrongful act, and not by any improper act of T., S. and D. were not justified in interfering and putting T. out of the building. A verdict having been found for S. and D. a new trial was granted on the ground that it was against evidence. *Tait v. Stronach, et al.* 1 P. B. 226.

### **14—Lodging complaint before justice**

A person is not liable to an action for false imprisonment who merely lodges a complaint before a justice, and leaves the proceedings to be taken in the discretion of the magistrate. *Brown v. Moore* 2 Pug 407.

### **Justice of the peace—Action for false imprisonment—Reasonable and probable cause.**

*See* Justice of peace, III. 13.

### **Justice of peace committing clerk of peace to gaol for not producing record of sessions.**

*See* Justice of peace, III. 8. *Wetmore v. Harding*.

### **Misnomer—Plea—Necessary averment.**

*See* Pleading II. 20.

### **Justification—Pleading.**

*See* Pleading II. 15, 16.

**Reasonable and probable cause.**

*See* Action at Law XI.

## VI.

## MISCELLANEOUS.

**Impounding Cattle—Evidence—General Issue.**

*See* New Trial III. 31.

**Attorney—Authority to issue execution.**

*See* Attorney V. 4.

**Pleading—Justification—Commissioners of Highways—Excess in laying out road—Plaintiff's case.**

*See* Evidence III. 19.

**Digging land—License from former owner—Inadmissible Evidence under General Issue.**

*See* Evidence XIII. 4.

**Justification—Special Assignment—Duplicity.**

*See* Pleading.

**License—De Injuria.**

*See* Pleading II. 17.

**Costs—Certificate—Separate judgment—Acquitted defendant—Special notice of defence.**

*See* Costs.

**Tenant against Landlord—Former adjudication.**

*See* Action at Law VIII. 8.

**Jurisdiction—Justice of the Peace to try action of trespass to land.**

*See* Justice of the Peace.

**Agreement for sale of stranded ship.**

*See* Shipping Law 7.

**Time—Allegation of—Immaterial.**

It is of no consequence that the time when a trespass is alleged to have been committed is subsequent to the commencement of the action, the allegation of time in trespass being immaterial. *Clarke v. Harding*, 1 P. & B. 495.

**Claim by Accretion.**

*See* Accretion.



**Contractors of Railway—No power to enter on private lands.**

*See Railway. Davidson v. King.*

**Joint trespasser—Participation in Act.**

To make a defendant liable as a cotrespasser it must appear, either that the trespass was committed by his direction, or that it was done for his benefit and that he adopted the Act. *Holder v. McGarrigle*, 2 *Pug.* 62.

**Justice's Court—Void judgment—Seising goods on execution.**

*See Judgment V. 9. Jackson v. O'Donnell.*

**A servant of the Crown is liable for his own wrongful acts—Excessive damages.**

*See New Trial III. 36*

**Son assault demesne—Replication—Evidence under.**

*See Evidence III. 38.*

**Summary conviction for an assault—Necessity for prayer to proceed summarily.**

*See Justice of Peace IV. 26.*

**Arrest on execution on judgment set aside.**

*See Estoppel IV. 1.*

**Tender of amends.**

*See Justice of Peace III. 6.*

**TRIAL.**

**Abandonment on Trial of Cause.**

*See Trespass II. 12, 13, 25.*

Cannot on trial, impeach validity of sale, on ground that execution is irregular. *Doe v. Watson*, 6 *All.* 175.

**Variance between judgment and recital in Sheriff's deed—Cannot be taken advantage of at trial.**

*See Sheriff's Deed 6.*

**Variance in note and description in summons—Summary action.**

*See Variance.*

**Tendering evidence at trial.**

*See Evidence XI. 6.*

**Discretion in Judge as to reception of evidence—Recalling witnesses.**

*See Evidence VIII.—New Trial III. 35.*

**Rejection of evidence.**

*See Evidence VIII.*

**Amendment on trial.**

*See Amendment IV.*

**I—Special counts—Particulars—Recovery under common counts—Counsel opening case.**

Where a declaration contains special counts, with a count for money had and received, and the particulars also apply to the latter count, the plaintiff may give evidence under the count for money had and received, though his counsel did not claim to recover on that count in opening the case. *Carrick v. Atkinson*, 5 All. 515.

**Objection to proceedings in Probate Court—Remedy by appeal—Irregularity cannot be objected to on trial.**

*See Deed I. 40.*

**Defendant wishing to limit plaintiff's right to recover land—Objection must be taken at trial.**

*See Ejectment III. 11.*

**Bankruptcy—Fraud in obtaining certificate cannot be shewn on trial.**

*See Evidence III. 18.*

**Loss of document—Preliminary proof to admit secondary evidence, sufficiency of, a question for Judge to determine.**

*See Evidence VII. 14.*

**Dismissal of servant—Taking advantage of other grounds than those averred.**

*See Master and Servant.*

2—Power of Judge on trial to direct verdict for plaintiff, subject to be set aside and verdict to be entered for defendant upon points reserved. This can only be affected by the jury finding a special verdict, when no consent is given. *Hughes v. Sutherland*, 1 Kerr 374.

**Application to add plea in replevin—No power in Judge to compel plaintiff to reply.**

*See Replevin 12.*

**Justice of the Peace—Trial by different Justices.**

*See Justice of the Peace IV. 4.*

**Whether plaintiff has made out a sufficient possession to entitle him to go to the jury, a question for Judge.**

*See Trespass I. 6.*

**Order for trial of causes—Authority in Judge to make.**

*See Judge's Order.*

**Undefended cause—There must be a plea on which issue can be joined.**

*See Practise VI. 45.*

**Right of plaintiff to have finding of jury on all issues.**

*See Practise XIV. 17.*

**3** ———Where defendant pleaded four pleas two of which were an answer in law to plaintiff's action and he was non-suited, held on motion to set aside the non-suit that he was not entitled to have finding of jury on the other issues, they being immaterial. *Martin v. Mutual Fire Ins. Co.*, 8 *Pug.* 157

**4—Fraud—No evidence of—Statement of witness contradicted—Not necessary to leave question of fraud to Jury.**

*Trueman v. Dixon*, 2 *P. & B.* 33.

**Satisfaction of debt—Whether note or bill is taken as discharge of debt, a question for Jury.**

*See Evidence XII.*

**5** ———Entries in books of account not conclusive against party. Credibility of witnesses, a question for jury, Manner of giving testimony, judge trying cause concluding that verdict against evidence, judgment will not be reversed on slight grounds. *Smith v. Andrews*, 1 *P. & B.* 541.

**Credit to whom given—Entries in books—Question left to Jury.**

*See Evidence XII. Raymond v. Cumming.*

**6—Point not raised at trial.**

Where Counsel in moving to set aside a non-suit sought to raise an objection not taken at the trial the court re-

fused to consider the point. *Doe dem. McVey v. Daniel*, 2 *Pug.* 372.

**7—Special Docket—Nisi Prius—Defence—Discretion of Judge as to bona fide belief of defendant—Striking cause off Special Docket.**

It must, to a great extent, be in the discretion of the Judge presiding at *Nisi Prius*, whether defendant *bona fide* believes he has a defence; or whether pleas are pleaded merely for delay, and without any expectation of being able to prove them. Plaintiff, therefore, takes the risk of entering his case on the special docket; and if, as the trial proceeds, the Judge is satisfied that defendant did really and *bona fide* intend to defend it, he would be justified in discharging the jury, and striking the cause off the special docket. *Lloyd v. Allen*, 2 *P. & B.* 239.

**Law and Equity.**

Principles distinct, therefore a Judge setting at *nisi prius* and hearing an action of ejectment has only to decide upon the legal rights of the parties and if the plaintiff makes out a legal title to the property he is entitled to recover, even though the defendant may be entitled to relief in equity.

A Judge may refuse to allow Counsel to address the jury and urge them to give a verdict contrary to his direction. *Doe d. Moffat v. Thompson*, 1 *P. & B.* 516.

**8—Charge of Judge—No objection raised by Counsel—No question sought to be left to jury.**

In trespass for assault on plaintiff, while in the act of driving off a highway into defendant's land, the highway being blocked by snow, defendant's counsel asked the Judge what direction he should give the jury, and on the Judge stating how he would direct, no objection was taken to the proposed charge, nor was the Judge asked to leave any question to the jury, and the counsel did not address the jury: *Held*, that defendant's counsel was precluded from afterwards objecting that certain questions were not submitted. *Parkhill v. Ward. Ward Appellant v. Parkhill*, 2 *P. & B.* 221.

**Opinion expressed by Judge.**

It is not a ground for a new trial that the Judge has expressed an opinion to the jury upon a question of fact, provided he did withdraw the consideration of the question from them even though the opinion expressed was incorrect.

See New Trial III. 62.

**Judge making or omitting to make a remark as to the character of testimony, not a ground for new trial.**

See New Trial II. 48.

**TRIAL BY RECORD.**

See Pleading IV.

**TROVER.****1—Tenant in common—Joint owner.**

*Quere*, Whether any, and what acts of a tenant in common or joint owner of a chattel, other than a destruction of the property will enable his co-tenant to maintain trover against him. *Wiggins v. White*, Ber. 97.

**2—Licensee—Crown land—Wrong doer.**

A person having a license from the Crown to cut timber on Crown land, cannot maintain trover against a wrong doer for timber cut and carried away by the latter from off the limits of the licensee. (But see act 18 Vic. cap. 7.) *Kerr v. Connell*, Ber. 133.

**3—Hiring horse—Felonious sale.**

A. hired the plaintiff's horse to go a certain distance, but went further, and sold the horse under such circumstances as to lead to the presumption that he intended to steal the horse at the time of hiring. *Held*, That the plaintiff could not maintain trover against the defendant who had purchased the horse, until he had done everything in his power to prosecute A. for the felony. (See *Contra—White v. Spettigue* 13 M. and W. 602. See further—Judge bound to try issue on the record. *Wells v. Abraham*, 7 L. R., Q. B. 554.) *Pease v. McAloon*, 1 Kerr 111.

**4—Evidence of felony—Judge.**

Although the circumstances are not conclusive evidence

of felony, but proper for the consideration of a jury, the question of felony cannot be left to them in an action of trover,—it is the duty of the Judge to determine whether there is sufficient *prima facie* evidence of felony to render a prosecution necessary. *Ibid.*

**5—Licensee—Timber—Wrongful sale.**

Plaintiff having a license from the owner of land to cut timber thereon, contracted with A. to manufacture the timber and raft it for the plaintiff. *Held*, That the property in the timber vested in the plaintiff as soon as it was cut without any delivery, and that he could maintain trover for it against a person to whom A. had wrongfully sold it. *Segee v. Perley*, 1 *Kerr* 489.

**6—Trustees—Absconding debtor—Vesting of property.**

The trustees of an absconding debtor duly appointed under the Act 26 Geo. III. cap. 13, may maintain trover for the value of goods of the debtor wrongfully converted by the defendant before proceedings taken under the Act; such right of action being transferred from the debtor to the trustees by operation of the Act. *Ritchie v. Boyd*, 1 *Kerr* 264.

**7—Shipping timber—Notice—Acquiescence.**

A. delivered timber to B. under an agreement that B. should ship as much as he could, and give A. credit for the amount. B. shipped a portion of it, and gave A. notice to take away the remainder; but subsequently shipped a further quantity. *Held*, in the absence of any proof of acquiescence in the notice by A., That B. was not liable in trover for the timber shipped after the notice. *Hughes v. Sutherland*, 1 *Kerr* 574.

**8—Seizure by Crown—Proceedings stayed—Property—Subsequent taking by wrong doer.**

Timber, cut by plaintiff without license, was seized by an officer for the Crown, and marked; no proceedings were taken towards condemnation; the officer kept no possession of it, and was afterwards ordered by the Government not to proceed to condemnation, but there was no act of the Government by which the constructive possession

was revested in the plaintiff, nor any actual possession of the plaintiff subsequent to the seizure. *Held*, That the plaintiff had no property in the timber to enable him to maintain trover against a person who took it wrongfully, subsequent to the seizure by the Crown. *Tobin v. Hutchinson*, 3 Kerr 283.

**9—Previous seizure—Possession—Title.**

The possession of timber which had been previously seized by the Crown for having been cut without license, is a sufficient title against all persons except the Crown, and the person so in possession may maintain trover against a stranger for taking it. *Coombes v. Hatheway*, 3 Kerr 592.

**10—Church Corporation—Trees severed.**

The property in trees growing on a glebe is in the Church Corporation, as the owners of the inheritance; and they may maintain trover for them if wrongfully severed, against a tenant of the Rector, or any person acting under the tenant's authority. *Rector etc. of Hampton v. Titus*, 1 All. 278.

**11—Accepted order for timber—Delivery—Usage.**

B. drew an order on defendant, a pond keeper, in favor of R. for five hundred tons of pine timber, which the defendant accepted and credited R. with the timber in account. R. afterwards assigned all his property to the plaintiff. *Held*, in the absence of any proof of title to the timber in B.; or that he had delivered it to the defendant, or of any usage in the timber trade relative to such acceptances, That no property vested in R. by the acceptance in any specific five hundred tons of timber, and that the action could not be maintained. *Pollock v. Fisher*, 1 All. 515.

**12—Assignment by deed—Property passing.**

Defendant had in his possession as a pond keeper, timber belonging to H., who, while it was in defendant's possession, made a general assignment by deed of his property to the plaintiff. *Held*, That this was an assignment of the property in the timber, and not merely of a chose in action, and that the plaintiff, after tendering the amount of the plaintiff's lien on the timber, might maintain trover against him. *Jack v. Eagles*, 2 All. 95.

**13 — Landlord — Tenant — Gas-fittings — Executory agreement.**

An agreement by a tenant of a shop that if the landlord would make certain improvements, the tenant would put in gas fittings, and leave them there when the lease expired is executory only, and vests no property in the gas fittings in the landlord, unless they are left by the tenant in the shop. If they are removed by the tenant before he leaves, the landlord cannot maintain trover for them. *Dunn v. Garret*, 2 All. 218.

**14—Taking timber—Conversion.**

Timber belonging to the plaintiff in this Province, being in the possession of the men who manufactured it, and who claimed a lien on it for their wages, was sold by them to the defendant, and taken into Canada at his request, where he caused it to be attached and sold for payment of the wages. *Held*, That the taking the timber into Canada was a conversion, and that the plaintiff was entitled to recover the value of it, without deducting what the defendant had paid the men. *McMullan v. Ritchie*, 2 All. 242..

**15—Manure—Not incident to land—Conversion.**

Manure in heaps on land (not the produce thereof) does not pass to the purchaser of the equity of redemption under a decree of sale, as an incident to the land; and if he uses it, it is a conversion, for which the mortgagor may recover in trover without a demand. *Thomson v. Walsh*, 2 All. 869.

**16—Manure—Landlord—Tenant.**

Manure lying in heaps in a barn-yard, is a chattel which may be taken away by the out-going tenant, even after his tenancy has expired, and trover will lie for it, if held or taken away by the landlord. *Foshay v. Barnes*, 1 Han. 450.

**17—Goods of tenant—Refusal by succeeding tenant.**

Where goods belonging to the plaintiff were left on a farm of which he had been tenant, and the defendant who succeeded him as tenant, refused to deliver them up without the consent of the landlord; but there was no evidence that the landlord had any claim to the goods, or had given



the defendant possession, or that he was holding them as the servant of the landlord—the Court refused to set aside a verdict for the plaintiff, on the ground that the refusal did not amount to a conversion. *Ruel v. McElroy*, 3 *All.* 212.

**18**———Though a refusal by a servant to give up property in his possession, until he can obtain directions from his master, may not amount to a conversion; he has no right to insist on the owner of the property obtaining the master's consent to the delivery. *Ibid.*

**19—Holding documents for both parties.**

A. executed a bill of sale to the plaintiff, and delivered it to the defendant, who agreed to hold it as the agent of both parties. *Held*, That the defendant's refusal to deliver the bill of sale to the plaintiff, without the consent of A., was not a conversion, and that trover could not be maintained. *Dever v. Myshraff*, 3 *All.* 354.

**20—Setting up right in third party—Defective claim.**

Plaintiff having cut timber without license on Crown land in Canada, brought it into this Province, and put it in possession of the defendants to be rafted for him; the defendants delivered it to M., who claimed it as having been cut on land licensed to him, but in fact his license had expired at the time the timber was cut. *Held*, in trover for the timber, That the defendants could not set up a right either in M. or in the Canada Government—M. having no legal right to the timber, and the Government not having made any claim to it. *Le Bel v. Fredericton Boom Company*, 4 *All.* 198.

**21—Allegation of one conversion—Evidence.**

In trover for several articles, the plaintiff may give evidence of acts of conversion on several days, though there is but one count in the declaration alleging one conversion. *Ultican v. Moffat*, 4 *All.* 298.

**22—Sufficiency of possession.**

In trover for timber cut by the defendant on wilderness land, described in a registered deed from B. to the plaintiff,

it was proved that for more than twenty years plaintiff had occasionally exercised acts of ownership over the land, by cutting timber and wild grass upon it, and that five years before the action, he had made a survey of it and marked the exterior lines ; no grant of the land was proved, and no possession shewn in B. *Held*, That the plaintiff had sufficient possession to entitle him to recover against a person shewing no title. *Coates v. McAuley*, 4 *All.* 521.

**23—Bill of sale—Condition—Demand—Non-disclosure of title—Conversion.**

A. gave B. a bill of sale of a pair of oxen to secure a debt, with a condition that A. should keep possession of the oxen, but if he undertook to sell them, or allow them to be taken in execution the bill of sale was to be absolute. A. afterwards sold the oxen to the defendant, and B. assigned his interest under the bill of sale to the plaintiff, who demanded the oxen of the defendant without informing him of the assignment of the bill of sale. *Held*, That the defendant's refusal to give up the oxen was no conversion as against the plaintiff. *Sharp v. Lawrence*, *Mich. T.* 1865.

**24—Joint conversion—Evidence.**

Logs were wrongfully cut on the plaintiff's land by P., one of the defendants, who afterwards sold them to T. the other defendant ; plaintiff demanded the logs from T., who refused to give them up and denied the plaintiff's right to them. *Held*, That this was evidence of a joint conversion by the defendants at the time of the sale by P. to T. *Hendricks v. Titus*, 2 *Han* 77.

**25—Tenant in common—Mixing of property.**

Sawing up logs of which the defendant is a tenant in common, and mixing the deals with others so that they cannot be distinguished, is evidence of conversion by one tenant in common against the other. *McKay v. Crocker*, 5 *All.* 20.

**26—Mixing property—Plaintiff's wrong.**

Plaintiff cut timber, part on land belonging to the defendant, and part on other land, and wrongfully mixed it with other timber belonging to the defendant, so that it

could not be distinguished from the defendant's timber. *Held*, That as the mixing of the timber was the wrongful act of the plaintiff the defendant had a right to the whole of the timber, and his taking it was not conversion. *Tucker v. Muirhead*, 6 *All* 420.

**27—Appropriation—Assent—Property.**

Plaintiff claimed timber under a letter written to him by A., the maker of the timber, stating that part of a quantity of timber in the river (which part was distinguished by a particular mark) was for the plaintiff, and requesting him to send money and provisions to A. to enable him to drive the timber; plaintiff sent the money and provisions to A., and furnished the marks of the timber to the defendants (a company incorporated for the purpose of picking up timber in the river and rafting it, when the marks were furnished), and afterwards obtained a portion of the timber from them. *Held*, That the letter was an appropriation of the timber by A. to the plaintiff, and that his subsequent acts were an assent to such appropriation, and vested the property in him. *Macpherson v. Fredericton Boom Co.*, 1 *Han.* 387.

**28—Licensee—Timber cut before license.**

A license to cut and carry away lumber from Crown land gives the licensee no property in timber cut on the land before the license issued, though on the land at that time, and the licensee cannot maintain trover for taking away the timber. *Carman v. McLeod*, 2 *Han.* 66-

**29—Sheriff—Improper sale—Execution—Fees.**

A. issued an execution against B. under which a levy was made of B's goods but no sale, the execution being withdrawn. A second execution under another judgment was issued by A. against B., and the Sheriff after selling goods to satisfy that execution proceeded to sell other goods of B. to satisfy him for fees on the first execution. *Held*, That such sale by the Sheriff was a wrongful conversion and that trover would lie. *Miller v. Weldon*, 2 *Han.* 188.

**30—Lumber cut without license—License subsequently obtained.**

Plaintiff cut timber on Crown land without license.

Before the timber was taken away, the defendant obtained a license from the Crown to cut timber on the same land, and afterwards took possession of the timber and hauled it away. *Held*, that under the Rev. Stat. cap. 133, sec. 6, the right to the timber vested in the defendant. *Leighton v. Bohan*, 6 *All.* 440.

**31—Property in plaintiff at time of conversion—Sheriff justifying under assignment under Insolvent Act—Bill of sale—Defendants justifying under Judgment and execution—Evidence.**

A. G. H. on July 28th 1875 gave his brother a bill of sale of certain horses. This was done on the occasion of A. G. H. and the plaintiff giving a new note for an indebtedness of A. G. H. for which plaintiff was liable. Formal delivery of the horses were made but they remained in the possession of A. G. H. On August 21st 1875 the defendant, Vail, levied on the horses in A. G. H.'s stables. On August 30th 1875 A. G. H. Assigned under the Insolvent Act, the plaintiff brought an action of trover against the Sheriff Vail and Romail the Judgment creditors, the defendants pleaded 1st not guilty, and 2nd that the horses were not the plaintiff's property. They put in evidence the judgment and execution under which the levy was made and the assignment to the official assignee under the Insolvent Act. There was nothing to shew that the assignee under the Insolvent Act had done anything to dispute the validity of the bill of sale, and the defendants did not claim under him. It was not sought to impugn the bill of sale under the Statute of Elizabeth. *Held*, that the defendants could not justify under the assignment to the official assignee: and as the property at the time of the seizure, and even down to the trial was in the plaintiff, the Sheriff was a wrong doer, and that the judgment and execution were properly admitted in evidence under the pleas. *Harris v. Vail, et al.* 1 *P. & B.* 587.

**32—Joint action—Wrong doer—Joint property.**

H. wrongfully sold logs the property of G. to R. who sawed them up into slabs. *Held*, that a joint action of trover would lie against both H. and R. *Gibson v. McKean and Randolph*, 3 *Pug.* 299.

**Landlord and Tenant—Agreement as to fixtures.***See* Fixtures.**Principal and Agent.***See***Damages—Bill of Exchange.***See* Bills and Notes IV. 2.**Selling Security before time.***See* Bills and Notes V. 19.**Bankruptcy of party—Property vesting in assignee—  
Right to maintain Trover, or action for money  
had and received.***See* Assumpsit III. 97.**TRUSTEE AND CESTUI QUE TRUST.***See* Equity.**TRUSTS.****Agreement—Undertaking—Conditions—Party—Contract.**

The St. Andrews and Quebec Railroad Company and class A. shareholders in the same Company, were incorporated by Act of Assembly 6 Wm. IV. cap. 91, and by Act of Parliament, for the purpose of constructing a railroad from St. Andrews to Lower Canada; but being unable to complete the road, they were subsequently empowered by Act 19 Vic. cap. 70, to agree with any company authorised to accept the same, for a transfer of the undertaking, and of all their lands, property, etc. Under the authority of this Act, an agreement was entered into between the St. Andrews and Quebec Railway Company, the class A. shareholders, and the defendants, the N. B. and Canada Railway and Land Company, (a company incorporated under the Joint Stock Companies' Act,) whereby the former agreed to convey to the latter (called the Transferee Company,) the undertaking of the St. Andrews & Quebec Railroad Co., and of class A. shareholders, and the control and management thereof, and all the lands, rights and property thereof, subject to certain conditions: (*inter alia*,) that the Transferee Company should complete the railroad, and

should forthwith discharge the liabilities of the St. Andrews and Quebec Railroad Company and class A. shareholders, specified in the schedule to the agreement. Among the liabilities specified in the schedule, was the following—"Liability, (if any) to the contractors in New Brunswick."

The Act declared that when the agreement of transfer was executed, all the undertaking of the St. Andrews & Quebec Railroad Company and the control and management thereof, and all their lands, property, rights and effects, and all their duties, obligations and liabilities, should be absolutely vested in, and imposed on the Transferee Company. The plaintiff had contracted with the St. Andrews & Quebec Railroad Company to build a portion of their road, and before the agreement of transfer was executed, had commenced a suit against them, which was pending at that time, and a decree was subsequently made in favor of the plaintiff. After the transfer, the St. Stephen's Bank advanced money to the Transferee Company, and obtained judgment against them, and issued execution, under which the lands transferred to them by the agreement, were levied on. *Held*, That the plaintiff not being a party to the agreement, no trust in his favor for the amount due him, was created thereby, and that he had no lien on the lands which vested in the Transferee Company under the agreement; but that the Transferee Company merely stood in the place of the St. Andrews & Quebec Railroad Company and undertook the discharge of their indebtedness out of the general funds of the Company. *Held* also, That the word "condition" in the agreement was to be read as a term of the contract, and not as a contingency, which, in case of failure of performance, would work a forfeiture of the estate granted to the Transferee Company. *Brookfield v. The N. B. & Canada Railway and Land Company, Trin. T. 1871.*

**Resulting trust—Absolute deed intended to operate as mortgage—Agreement to recovery—Agency.**

W. held a certain property of S., under an absolute deed, but which was really given as security. S. being desirous of having the property purchased by a friend, who would convey to him as soon as he was able to pay the

amount of the purchase money, spoke to M., an intimate friend, requesting him to purchase, which the latter did; but no agreement was made that M. should purchase for S., or hold the property by way of mortgage. Before W. consented to sell at the price agreed upon, he required and obtained from S. security for the balance of his claim against him, which S. afterwards paid, but this formed no part of the purchase money. *Held*, That, in the absence of satisfactory evidence of an agreement by M. to reconvey to S. in case he should afterwards be able to pay for it, he was not bound to reconvey, even although there was strong ground for suspecting that M., at the time of purchase, intended S. to believe that he would do so. *Held*, also, That M. could not be considered the agent of S. to purchase, in the absence of an agreement to that effect; nor was there a resulting trust to S., no part of the purchase money having been paid by him. (Fisher, J., *dissentiente*.) *Sutherland v. Meehan*, 3 *Pug.* 289.

**Devisee of residue of estate in trust—Construction of will.**

*See* Will 5.

**Devise in Trust.**

*See* Will.

**Infant joining in deed with cestui que trust.**

*See* Infant.

**TRUSTEES.**

*See* Absconding Debtor.

**Trustees remaining in office.**

*See* Bank.

**Conveyance to trustees—Provision for other trustees being nominated and appointed—Legal estate.**

*See* Deed III. 3.

**Conveyance by.**

A person having the legal estate in land may, by conveyance at law, pass such estate, though it was given to him in trust. *Doe v. Gilbert*, 1 *All.* 520.

**Devise to two persons in trust—Conveyance by one—Effect.**

*See* Will 12.

**Supervision of proceedings of trustees.**

*See* Supreme Court in Equity.

**Relation of trustee and cestui que trust created.**

*See* Equity 2 a.

**Revocation of authority.**

*See* Revocation.

**TRUST DEED.**

*See* Deed.

**ULTRA VIRES.**

*See* British North America Act 1867.

**UNDEFENDED CAUSE.**

**Must be a plea on which issue can be joined.**

*See* Practise VI. 45.

**UNDERWRITER.**

*See* Insurance.

**UNITED STATES CURRENCY.**

**Note payable in.**

*See* Bills and Notes I. 15.—*See* Judicial Notice 8.

**UNIVERSITY OF NEW BRUNSWICK.**

**Senate—Powers of.**

By the Act 22 Vic. cap. 63, sec. 8, the Senate of the University of New Brunswick has absolute power, subject to the approval of the Governor in Council to remove any of the professors, &c., without any formal proceeding in the nature of a trial, and such removal not being a judicial act, the Supreme Court has no power by *certiorari* to remove the proceedings and enquire into it. *Ex parte Jacobs*, 5 *All.* 153.

The power of the Senate to remove is not limited to officers appointed by them, but extends to officers appointed under the Charter of King's College, and who continue to act under the corporation established by the Act 22 Vic. cap. 63. *Ibid.*

The general supervision of the affairs of the University is vested in the Lieutenant Governor of the Province as visitor, and an appeal lies to him from any Act of the Senate.



The fact that the Governor in Council approving of an Act of the Senate, (being done by the advice of the Executive Council,) does not incapacitate him as visitor from afterwards investigating the matter, and giving a decision thereon founded on his sole responsibility.

In giving a decision as visitor the Lieutenant Governor acts in a judicial character.

The power to appoint a President of the University is vested by the Act in the Governor in Council. *Ibid.*

#### **USAGE OF TRADE.**

*See* Custom and Usage of Trade.

“ Contract.

#### **UNCERTIFICATED ATTORNEY.**

*See* Attorney.

#### **USE AND OCCUPATION.**

**Defendant marrying widow of tenant—Liability for rent.**

*See* Husband and Wife I. 5. *See* Landlord and Tenant.

**Wharf built without authority—Vessel lying.**

*See* Action on the Case IV. 8.

**1—Agreement to sell—Rescission of.**

The plaintiff recovered judgment in ejectment against the defendant, but before issuing a writ of possession, agreed to sell him the land, which agreement the defendant afterwards refused to complete. *Held*, That the defendant was liable in an action for use and occupation, for his holding since the refusal to complete the purchase. *Parker v. England*, 3 *All.* 340.

*Quære*, Whether, without such agreement, the plaintiff could waive the *tort*, and recover for the use and occupation subsequent to the judgment. *Ibid.*

**Omission in Statute—Demise by Deed.**

*See* New Trial III. 55.

**2—Pew—Defence—Joint occupation.**

Assumpsit lies for the use and occupation of a pew, and it is no defence under the general issue that others occu-

pied the pew jointly with the defendant. *Trustees of St. Andrews Church v. Ferguson*, 1 Han. 273.

**2—Holding by permission—Necessity of evidence of.**

To maintain an action for use and occupation, there must be some evidence of a holding by permission of the plaintiff; therefore, where there is no evidence of any contract or negotiation, and it appears that at an interview between the parties about the property, the defendant refused to make any arrangement, and claimed the title, it was held that the action would not lie. *McCully v. Ward*, 5 All. 505.

**4** ——— The right to waive a tort, and bring an action *ex contractu*, applies only to actions for money had and received. *Ibid.*

**USES (STATUTE OF.)**

The 27 Hen. VIII. cap. 10, Statute of Uses is in force in this Province. *Doe d. Hannington v. McFadden*, Ber. 153.

**USURY.**

See Bills and Notes V. 34.

**Mortgage—Broker.**

Where a mortgage on real estate was given by A. to B. for the purpose of being sold, and afterwards assigned to C. who took it at a discount of 10 per cent., B., who acted merely as broker in the transaction receiving one per cent. Held, in a suit for foreclosure against the purchaser of the equity of redemption, That the transaction was usurious, and that even if defendant was only the colorable purchaser it would not affect the case. *Jardine and others v. McWilliams*, 1 Han. 579.

**Note given for illegal interest—Not recoverable—Defendant entitled to set off what was paid over 6 per cent.**

See Bills and Notes VI. 18. *Peters v. Horton*.

**VALUATORS.**

See Landlord and Tenant VI. 4.

**VARIANCE.**

See Amendment—Bail—Bond—Bills and Notes—Conviction—Criminal Law—Pleading—Record.

**1—Proof—Allegation. .**

In an action on a written memorandum, whereby the defendant, for "value received, promised to pay the plaintiff a certain sum in current bank bills," it is necessary not only to allege the actual consideration, but the proof must correspond with the allegations. *Whitney v. Marks*, 1 *Kerr* 179.

**2—Execution—Judgment—Sale.**

A *fi. fa.* was for £47 2s. 9d., and the judgment upon which it was founded for £46 11s. 9d. only. *Held*, That this variance would not defeat the sale made under such execution, on the ground that such execution was not warranted by the judgment, it not being questioned that the execution had in fact issued upon the judgment. *Linton v. Wilson*, 1 *Kerr* 223.

**3—Summary process—Copy—Note.**

A variance between a promissory note proved, and that set out in the copy of a summary process served on the defendant, cannot be taken advantage of on the trial, if the note correspond with the original, which is the record *Steadman v. Holstead*, 3 *Kerr* 355.

**4—Averment—Proof.**

Where the declaration averred that the plaintiff indorsed and delivered a certain order of A. to the defendants, and the evidence was that the plaintiff indorsed and delivered the order to a firm composed of one of the defendants and other individuals, but in which the other defendant had no interest, in part payment of a debt due to such firm. *Held*, A variance. *Horton v. Tibbetts*, 1 *All.* 61.

**5—Words—Transposition of—Description.**

The declaration in an action for false representation in the sale of goods, described the article "Imperial pale yellow Glasgow soap," and set out the price under a *videlicet*; the evidence was that it was called "Imperial Glasgow pale yellow soap." *Held*, That the transposition of the words was immaterial, and that the exact price need not be stated. *Mages v. Street*, 1 *All.* 242.

**6—Declaration—Proof.**

The declaration stated that J. G. was indebted to the plaintiff in £50, and that the defendants, in consideration that the plaintiff would forbear and give time to J. G. for payment, promised that the defendants would pay. *Held*, That this declaration was not supported by a guarantee of the defendants that J. G. should pay. *Johnston v. Fraser*, *Mich. T.* 1882.

7 ——— The declaration in an action on a judgment of the Court of Common Pleas, stated it to have been recovered for the non-performance of certain promises and undertakings. *Held*, on *nul tiel record* pleaded, That this declaration was not proved by a copy from the minutes of the Court of Common Pleas, which did not state the cause of action for which judgment was recovered. *Wheeler v. Grant*, *Mich. T.* 1882.

**8—Judgment—Execution.**

In an action against bail, in which the judgment set out against the principal was for £596 17s. the defendant pleaded, that no *ca. sa.* was duly sued out against the principal; replication,—that a *ca. sa.* was sued out upon the said judgment (setting out a *ca. sa.* for £81 16s. 10d.) as appears by the record thereof. *Rejoinder*, That there is not any record of the said writ of *ca. sa.* *Held*, after judgment for the plaintiff on this issue, That the variance between the amount of the judgment and the execution, was no ground for arresting the judgment. *Spence v. Stewart*, *Ber.* 219.

**—Judgment—Recital.**

In ejectment, claiming under a Sheriff's deed, the execution under which the sale took place recited a judgment for £1105 11s., debt, and £5 11s., costs: the judgment was for £1105 11s., in the whole. *Held*, That the variance was only an irregularity, which could not be taken advantage of at the trial. *Doe dem. Walsh v. Dalton*, 6 *All.* 387.

**Proof of words—Defamation.**

*See* Defamation 15.

**VENDITIONI EXPONAS.**

**Irregularity in—Purchaser not affected by.**

*See Doe v. Hazen, 8 All. 87.*

**VENDOR AND PURCHASER.**

*See Caveat Emptor. See Sale.*

**1—Purchaser's right to good title.**

A purchaser of land has a right to a title free from incumbrances, and if the vendor is unable to give such a title, the purchaser may recover back his deposit. *Scott v. Garnett, 2 All. 624..*

A notice to the vendor from the purchaser that the land sold does not answer the description, and that he will not complete the sale, is not a waiver of objections to the title. *Ibid.*

**2—Admission of receipt of money.**

*Quere,* Whether one who has conveyed land, and acknowledged in the deed the receipt of the purchase money, can recover a balance unpaid, on an admission by the purchaser that he owes it. *McAllister v. Day, 4 All. 37.*

**3—Word "sell"—Meaning—Dependent promise.**

Plaintiff agreed to sell land to the defendant for £40, and the defendant agreed to pay the money on a certain day, for the consideration above named. *Held*—1st. That the word "sell" necessarily included an agreement to convey; 2nd. That the defendant's promise to pay the money was a dependent promise, and that the plaintiff could not maintain an action therefor without tendering a conveyance of the land. *Sweeny v. Godard, 4 All. 400.*

**4—Party selling should prepare conveyance—Wife should be a party.**

It is the duty of the seller of land to prepare the conveyance, and if he has a wife who would have a right of dower in the land in case she survived him, she should be a party to the conveyance. *Ibid.*

**5—Vendor and Vendee—Breach of agreement—Damages.**

In an action against the vendee for breach of an agree-

ment to purchase land, the plaintiff cannot recover the amount of the purchase money agreed to be paid for the land; but only such damages as he has sustained by the breach of the agreement. *Pugsley v. Gillespie, Mich. T. 1872.*

**Agreement—Refusal to purchase.**

*See* Landlord and Tenant. I. 8 a.

**As to recovery of deposit on failure of title.**

*See* Assumpsit III. 19, 24.

**VENIRE.**

*See* Error (Writ of) 8—*See* Jury.

**Sheriff interested.**

Where the Sheriff is interested, the jury process must be directed to the Coroners of the county, if more than one; and though it may be executed by one Coroner, the return must be in the name of the whole of them. *Noble v. Temple & Pelton v. Temple, 1 Han. 274.*

A *venire* directed to one of the Coroners of a county is bad, unless the others are interested. *Ibid.*

**Coroner—Interest.**

In an action for calls on stock, the coroner who summoned the jury was a stockholder, but, before receiving the *venire*, transferred his stock, which was not all paid up, to the president of the company. The Act of Incorporation declared that no shareholder should be entitled to transfer his stock, unless all calls were paid. In summoning the jury, the Coroner questioned them as to their views in regard to railways, and was guided in his selection by their answers. *Held*, That he had not divested himself of his interest, and was not an impartial officer, and there must be a *venire de novo*. *Woodstock Railway Co. v. Tupper, 1 Han. 454.*

**Common Venire, when sufficient—Limit Bond.**

In an action by the assignee of a limit bond to which *non est factum* is pleaded the common *venire* to try the issue is sufficient; and the plaintiff need not have damages assessed, but may take a verdict for nominal damages, and

issue execution for the amount of his debt. *McElroy v. Getty*, 1 *Han.* 261.

Motion for *venire de novo* may be made in the same manner as a motion for a new trial. See *Pelton v. Noble*, 1 *Han.* 274.

#### VENUE.

See Practise II.

#### VERDICT.

**Motion to increase verdict when case disposed of by previous judgment, refused.**

See Practice V. 89. *Bangor Ins. Co. v. McLeod*.

**Incompetent for plaintiff to fix damages—Where party entitled to nominal damages.**

See Practice V. 52. *Steves v. Wilson*.

**Replevin—Finding of Jury for part of property, plaintiff entitled to have verdict for amount found.**

See Replevin 89. *Hannington v. Carmier*.

**Defendant entitled to verdict on merits on one issue—Finding of Jury for defendant in an issue which should have been found for plaintiff—Verdict allowed to be amended.**

See Replevin 5. *Baxter v. Johnston*. Practice—New Trial.

**Evidence of amount of original debt.**

See *McIlhaney v. Wiswell*, *Ber.* 67.

**Postea ou.**

See Replevin 4.

**Judgment not signed, verdict cannot be pleaded in bar between same parties.**

See Pleading II. 41.

#### VEXATIOUS PROCEEDINGS.

**Staying proceedings.**

See Second Action.

#### VIEW (JURY OF).

“ Jury.

#### VIS MAJOR

“ Boom Company.

**VOLUNTARY CONVEYANCE.**

*See* Deed.

**VOTE.**

“ Election.

**VOYAGE.**

“ Insurance—Shipping Law.

**WAGER.**

**Deposit of money—Horse race.**

*See* Action at Law I. 3.

**WAGES.**

**Action for.**

*See* Assumpsit—Shipping Law.

**WAIVER.**

An underwriter may waive the production of preliminary proof of interest in the assured by objecting to pay the loss on a different ground. *Dimock v. New Brunswick Marine Assurance Co.*, 3 Kerr 654. *See* Insurance 9.

**Waiver of proof of loss.**

*See* Insurance 33 a.

An objection to service of a notice of motion is waived, if not taken before the argument commences. *Wetmore v. Levy*, 4 All. 510.

Waiver of provisions of Act of Parliament cannot be presumed. *Kerr v. Burns*, 4 All. 604.

**Waiver of privilege—Witness.**

*See* Arrest 5.

**Waiver of Tort.**

*See* Assumpsit III. 15, 26, 37—Use and Occupation 4.

**Waiver of Notice of Dishonour and Presentment.**

*See* Bills and Notes III. 6, 7, 8, 9.

**Waiver of Laches—What not a waiver.**

*See* Bills and Notes IV. 12.

**Waiver of irregularity in Affidavit to hold to bail.**

*See* Bail 10, 80.



**Waiver of Bailable Capias stating no cause of action.**

*See Practice IV. 1.*

**Waiver of Notice of Render.**

*See Bail 35.*

**Waiver of objection to Commission addressed to four persons, being executed only by three.**

*See Evidence IX. 8.*

**Waiver of objection to evidence of justification under plea of not guilty.**

*See Evidence XI. 28.*

**Waiver of right to sell real estate under will—License.**

*See Executors, etc., II. 3.*

**Waiver of irregularity in proceedings—Giving cognovit.**

*See Cognovit 3.*

**Waiver of service of summons.**

*See Justice of the Peace IV. 16 a, 17.*

**Waiver of want of signature of defendant to offer to confess judgment.**

*See Judgment II. 5.*

**Waiver of irregularity in service of rule—Counsel appearing.**

*See Practice VII. 2.*

**Waiver of want of precept—Appearance.**

*See Practice VI. 42.*

**Waiver of want of affidavit—Taxation of Costs—Attendance.**

*See Costs IV. 68.*

**Waiver of irregularity — Intitling declaration — Pleading.**

*See Practice I. 3, VII. 3 a.*

**Juror taken ill—Swearing another in his stead—Defendant's counsel addressing jury—No waiver of irregularity.**

*See Jury 9.*

**Counsel making defence—Cause called on by surprise.**

*See New Trial II. 37.*

**Signing interlocutory judgment—Defendant's attorney in contempt—Ignorance of fact by plaintiff.**

*See Practice VII. 11.*

**Irregularity in signing judgment—What not a waiver of.**

*See Practice VII. 12.*

**Defendant not filing demurrer—Plaintiff's solicitor accepting copy, no waiver.**

*See Practice in Equity I. 10.*

**Defence not pleaded as required by Act 13 Vic. cap. 32—Right of plaintiff to waive pleading.**

*See Replevin 7.*

**Waiver of defect in affidavit.**

*See Affidavit V. 15. McIntosh v. Burnett.*

**Waiver by use of property.**

*See Assumpsit III. 47 c. Waterous v. Morrow.*

**Setting aside bail bond on account of affidavit not being filed.**

*See Practice VI. 57. Lewis v. Weldon.*

**Re-examining witness on evidence improperly admitted.**

*See Evidence VIII. 87. Smith v. Gerow.*

**Insurance—Joining issue on plea—When plaintiff cannot shew a waiver.**

*See Insurance 44. Martin v. M. Ins. Co.*

**Filing plea—Omission to do so—An irregularity which may be waived.**

*See Practice VII. 17. Devoe v. Wiley.*

#### **WAREHOUSEMAN.**

**Liability for goods deposited, given up contrary to instructions.**

*See Bailment 3.*

#### **WARRANT.**

*See Arrest—Justice of the Peace—Absconding Debtor.*

#### **WARRANT OF ATTORNEY.**

**Entering up judgment—Leave.**

*See Practice V. 36.*

**1—Consideration—Severable—Setting aside.**

If part of the consideration for a bond and warrant of attorney is good and severable from the bad; the Court will only destroy the effect of the bad part. *Secord v. Green*, 1 All. 41.

Where in answer to an application to set aside a warrant of attorney and judgment thereon for fraud, the plaintiff shewed a good consideration for part of the demand, though the remainder was not satisfactorily explained, but no collusion appeared, the Court dismissed the application without costs, the plaintiff consenting to reduce his demand to the sum proved. *Ibid.*

It is not a sufficient ground for setting aside a warrant of attorney founded on a good consideration, that it was executed by the defendant without the privity or request of the plaintiff, if he afterwards accepts it and avails himself of the security. *Ibid.*

**2—Judgment—Old warrant—Setting aside.**

A judgment signed under a Judge's order upon a warrant of attorney more than a year old, will not be set aside, unless it appears that injustice has been done, though the affidavit, on which the order was made, may not have been strictly sufficient; particularly when the defendant's affidavit supplies the alleged defect. *Smith v. LeBurgue*, 1 All. 266.

**3—Application to set aside—Answer.**

It is no answer to an application by a creditor of the defendant to set aside a judgment on a bond and warrant of attorney given by him to the plaintiff, on the ground of fraud and want of consideration, for the plaintiff to state that the bond was given for the amount of a promissory note given by the defendant, of which the plaintiff was the holder, without stating in what character, under what circumstances, or at what time he became the holder, and what consideration he gave for it. *Bacon v. Hoar*, 1 All. 664.

**4—Continuing security.**

The defendant owed the plaintiff about £200, and re-

quiring further advances from time to time, applied to the plaintiff, who agreed to make them on receiving sufficient security; the defendant thereupon gave the plaintiff a bond and warrant of attorney for £1855, conditioned for payment of £927 14s., on which judgment was entered up. *Held*. That the judgment was valid as a continuing security, and could be enforced for the amount really due on a final settlement between the parties, and although, at some period of their dealings, the balance might have been in favor of the defendant, the judgment was not thereby satisfied, if such was not the intention of the parties. *Held*, also, That a want of defeasance did not render the warrant of attorney void. *Lunt v. Estabrooks*, 3 Kerr 144.

5 ——— Defendant, who, in December 1868, owed plaintiff \$1,800 for supplies, gave him a Bond and Warrant of Attorney to confess judgment for \$10,000. The defeasance stated it to be given to secure the re-payment of the \$1,800 due, and "such further advances in the whole not exceeding \$5,000, as the said Eaton may advance to the said Lawrence." Plaintiff having entered up judgment upon the Bond and Warrant of Attorney, in June 1869 issued execution for \$3,417. On a motion to set this execution aside, defendant in his affidavit alleged that he shipped lumber to the plaintiff to satisfy the judgment, and had a settlement in 1867, when plaintiff was indebted to him, and that the Bond, etc., was not given as a continuing security. The plaintiff alleged it to be a continuing security, and denied that there had been any settlement. From December 1865 to December, 1868, the plaintiff and defendant had transactions to the extent of over \$30,000. *Held*, per Weldon and Fisher, J. J., That it not being clear that there had been any settlement, and there being nothing in the defeasance to prevent it being a continuing security, the plaintiff was entitled to his judgment. *Eaton v. Lawrence*, 2 Han. 85.

**6—Creditor taking for larger sum than due.**

A Bond and Warrant of Attorney, taken by a creditor for a larger sum than is due to him, are void as against

other creditors, under the Stat. 18 Eliz. cap. 5, and will, together with the judgment thereon, be set aside on the application of another creditor, whose debt may be defeated thereby. *Biggs v. Eagles, Trin. T. 1884.*

**7—Marking—Initials—Omission.**

The omission by an attorney who signs a confession under a warrant of attorney, to add the date of signing and to mark the initials of his name upon the warrant of attorney, as required by the rule of Trinity Term 1857, does not render void a judgment signed on such confession. *Levi v. Muzeroll, 3 All. 598.*

**8—Need not be under seal—Recognition—Equities.**

A warrant of attorney to confess judgment need not be under seal. *Hutchinson v. Johnston, 4 All. 40.*

A bond and warrant of attorney under seal, were executed by A., in the name of himself and B., with a defeasance stating that the warrant of attorney was given to secure the plaintiff for advances made and to be made to A. and B., in carrying on their shipbuilding operations, and that the plaintiff might sign judgment and issue execution, from time to time, for whatever amount A. and B., or either of them, should then be owing for such advances. *Held*, That as the warrant of attorney need not be under seal, a judgment signed thereon would bind B. if he recognised it, though A. had no authority to execute it. *Ibid.*

A recognition may be implied from the conduct of a party—as where, knowing of a warrant of attorney and judgment against him, he allows them to stand for three years without objection, and continues to deal with the plaintiff on the security of them. *Hutchinson v. Johnston, 4 All. 40.*

A party applying to the equitable jurisdiction of the Court, to be relieved from a judgment, must do what is equitable towards the other party. *Ibid.*

**Ordering issue to be tried—Doubtful fact.**

*See Practice XII.*

**Defendant in custody.**

*See Practice VII. 6.*

**Attorney taking warrant of attorney.**

*See* Attorney X. 10.

**Suspension of remedy.**

*See* Judgment.

**Judgment on—Setting aside—Costs.**

*See* Costs X. *Hardy v. Prince*, 3 All. 264.

**WARRANTY.****Damages—Evidence in reduction.**

*See* Damages II. 2.

**Implied warranty—Breach of.**

*See* Deed V. 3.

**Insurance—Answers to questions.**

*See* Insurance 89.

**1—Sufficient evidence of.**

In an action on the warranty of horses a conversation just before the delivery between the parties, when the plaintiff said, "You say these horses are sound," etc., and the defendant replied, "Yes, they are;" coupled with a subsequent refusal of the defendant to take back the horses, "because they were as he warranted them," are sufficient evidence from which the jury may infer that a warranty was given at the time of the sale, no witness appearing to have been present at the sale. *Libby v. Nesbit*, 1 Kerr 362.

**2—Representation—Question for jury.**

Where at the time of a bargain between the parties for the sale of timber, the quantity of which could not be then ascertained, the defendant stated that he "knew the timber to be good, and would make it good—that there had been an opportunity of examining it as it lay on the brow," shortly after which the plaintiff took the timber, which turned out mostly rotten and worthless, and the defendant had afterwards said that he had sold 101 tons for £100, which appeared to be the full price for good timber. *Held*, That it was a question for the jury, whether the representation amounted to warranty, and that they might infer

that a sale took place at the time of such representation  
*Irvine v. Godard*, 1 Kerr 364.

3 ——— Where at the time of making a verbal contract for the sale of 1250 tons of pine timber, then in charge of C., a pond keeper, B., the vendor, represented to A., the vendee, "that the timber was of good quality and uncommon long lengths;" upon which A., who wanted timber of that description for shipment, was induced to give more than the ordinary price; and A. had also seen the timber afloat in the raft, and afterwards received an order from B. upon C. to deliver A. twelve hundred and fifty tons merchantable white pine timber, averaging seventeen inches square, which C. accepted. *Held*, That it was a proper question for the jury, whether under all the circumstances, the representation amounted to a warranty. *Tisdale v. Connell*, 1 Kerr 401.

#### 4—Representation—Contract—Pleading—Damages.

In an action upon an alleged warranty of ownership upon the exchange of wagons, the defendant pleaded the general issue, and also in abatement the pendency of another suit for the same cause of action. *Held*, That he could not avail himself of the latter plea. Where plaintiff exchanged wagons with defendant, the latter representing that he had the wagon he was exchanging built expressly for himself, and subsequently it turned out that the wagon was not his, and it was replevied and taken from the plaintiff by the real owner. *Held*, That such representation formed part of the contract, and that plaintiff could recover from defendant the value of the wagon, but not the cost of defending his title in a writ *de proprietate probanda*. *Mercer v. Cosman*, 2 Han. 240.

#### 5—Representation—Quality.

The plaintiff purchased from the defendant, a commission merchant, soap which he had on consignment, and represented to be Glasgow pale yellow soap, a well known and superior article; neither party examined the soap before the sale, but, on examination a few days after, it proved to be useless, of which the plaintiff notified the de-

defendant and requested him to take it back. *Held*, That the defendant was liable, though from his information from the consignors he might have believed that the article substantially agreed with his representation, and that the plaintiff was entitled to recover the whole price, though the defendant had remitted the proceeds to the consignors before receiving the notice. *Magee v. Street*, 1 All. 242.

**Article fairly answering description of that agreed to be sold.**

*See Contract 22.*

**6—Representation—Title to land—Word “purchase.”**

An agreement by which the defendant agreed to sell to the plaintiff—“all his right, title and interest to the timber growing on a certain block of land, being the same tract which he (defendant) purchased from the crown”—does not amount to a representation that the defendant has a title to the land, the term “purchase” does not necessarily imply a conveyance of land but may be understood to signify a bargain or agreement for it. *Ash v. Clarke*, 3 Kerr 187.

**7—Landlord and tenant—Fitness of premises for purposes to be used for—Evidence.**

Where there is no express warranty of fitness of premises for purposes desired, the representations of fitness should be clear and direct, and evidence must be sufficient to leave to the jury of defendant's liability on such representation—one of the plaintiffs applied to one of the defendants to hire two compartments in defendant's building the latter referred the plaintiffs to Mr. Holden as the person who had the leasing of the premises on behalf of the owners—the plaintiffs saw him and told him what they wanted and enquired of him, if it was capable of storing 200 tons of salt, to which enquiry he replied that Mr. Melish not long before that had had these compartments both filled with salt—held not sufficient evidence of warranty, there being no evidence that such statement was untrue. When reference is made to an agent for leasing the property, plaintiffs might reasonably assume that he was invested



with authority to answer a question put to him, and the principal in general bound thereby. *Taylor v. Reed*, 2 P. & B. 58.

**Insurance warranties.**

*See Insurance.*

**WASTE.**

“ Action on the Case I. 9.

**WATER COMPANY.**

**Obligation to keep supply of water.**

The defendants were incorporated by the Act 2 Wm. IV. cap. 26, for the purpose of supplying Saint John with water, and were required to make in every street through which their pipes were laid, vents for supplying water whenever fires should happen in the city. The 9 Vic. cap. 64, made all buildings fronting on streets through which pipes were laid, subject to an annual rate for the benefit of the Company, and required them during the continuance of the Act, to establish fire plugs for supplying water whenever fires should happen, and to keep the same in good and sufficient serviceable order. *Held*, That the duties imposed upon the Company could not be carried beyond the fair import of the terms used by the Legislature; and therefore that they were not bound to keep a supply of water all the time, by day and night, in the pipes, so as to be made liable for the damage sustained by fire catching to a building owned by one of the rate-payers, which might have been saved had the water been immediately available for extinguishing the fire. *Blakslee v. Saint John Water Company*, 1 All. 689.

**WATER COURSE.**

*See Easement.*

**Dam—Erection of—Destruction of by persons not obstructed—Injunction.**

Though a dam erected in a stream, which is capable of being used as a highway for floating lumber, may be a nuisance as regards the public, and the owner of the dam may consequently be liable to a prosecution for erecting it,

no person who has not been thereby obstructed in the exercise of his public right to use the stream, is justified in destroying the dam. Thus, where the plaintiff and defendants owned mills on the opposite sides of such a stream, and the plaintiff had erected a wing-dam, extending from his mill in a diagonal direction to the centre of the stream, for the purpose of increasing the supply of water to his mill, and the defendants also maintained a dam across the stream to supply their mill; they were restrained by injunction from destroying the plaintiff's dam, though they claimed the right to do so, because it obstructed them in floating logs down the stream to their mill. *Davis v. Hayden, M. Rolls, January, 1864.*

**Agreement to enlarge water course—Evidence.**

*See Evidence II. 24.*

**WAY.**

**Obstructions.**

*See Action at Law IX. 88.*

“ Action on the case IV.

**Right of foot way not included in right of carriage way.**

*See New Trial II. 51. McRoberts v. McBride.*

**WEEKLY ALLOWANCE.**

“ Insolvent Confined Debtor.

**WHARF.**

**Approach to—Obstructing.**

*See Action on the Case IV. 3.*

**WHARFAGE.**

**1—Top wharfage—Assumpsit for.**

Under the Act 5 Vic. cap. 89, sec. 6, an action of assumpsit may be maintained to recover top wharfage against the owner of goods landed on a wharf; the words “sue for” and “recover” indicating a proceeding *in personam*. The remedy by distress given by section 7 is only cumulative. (*See Vestry of St. Pancras v. Battersbury, 2 C. B., N. S. 477, Mayor of Blackburn v. Parkinson, 1 E. and E. 71.*) *McLeod v. Yeats, East. T. 1861.*

**2—Averment and proof concerning wharf.**

In order to recover top wharfage, the plaintiff must aver and prove affirmatively that the wharf was "properly planked or timbered on the surface," and this is not proved by evidence that the wharf was in good order. *Ibid.*

**3—Wharf below low water mark.**

Plaintiff and defendants, owners of lots which extended side by side from St. John street to low water mark, in the harbor of St. John, by deed made a common passage way twelve feet wide along the length of each lot, on which each was bound to build and keep in repair a wharf, and each conveying to the other the right of way over the wharf, the plaintiff's right of wharfage on the north side of the street being reserved. Afterwards the plaintiff obtained from the Corporation of St. John the right to erect a wharf beyond low water mark, extending from the end of said passage way for the public use, in the same manner as the part already built. Subsequently an Act was passed allowing the owners of wharves to collect top wharfage on goods landed on them. *Held*, That defendants were entitled to pay plaintiff top wharfage on goods landed by them on the wharf built by plaintiff below low water mark. *Collins v. Hall & Fairweather*, 2 *Han.* 90.

**Liability to pay wharfage.**

*See* Easement 8.

**WHARFINGER.****Vessels subject to order of.**

*See* Fredericton (City of) 9.

**WIDOW****Holding possession.**

*See* Possession 4.

**Restraint of marriage.**

*See* Will 8.

**Dower—Right—Action.**

*See* Dower.

**WIFE.**

" Husband and Wife.

**Wife of one prisoner offered as witness for another.**

*See* Witness.

**Dower barred by adultery.**

*See* Divorce 2.

### **WILDERNESS LAND.**

“ Ejectment—Limitation of Actions—Possession—Trespass.

### **WILD LAND TAX.**

*See* Assessment.

### **WILFUL INJURIES.**

**Injuring fence—Summary conviction.**

*See* Justice of the Peace IV. 11—Criminal Law.

### **WILL.**

#### **1—Proof of—Witness—Signature.**

Where the defendant made title to the land in question under a deed from one of the devisees in trust under the will of J. H., to which will the defendant's name appeared as the last of three attesting witnesses, and one of the other witnesses when called to prove the will could not remember the defendant's having been present at the execution—but swore that it was executed in presence of himself and one C., the other attesting witness, who was out of the Province, *Held*, That proof of the defendant's signature was admissible and sufficient to raise the presumption that the will was duly proved under the Statute of Frauds—(Parker J., *dissentiente*.) *Hamilton v. Love*, 2 Kerr 228.

#### **2—Construction—Term grandson.**

The testator devised property to his wife for life, and at her death to his grandson Rufus ; he also gave property to his son and daughters, describing each of them by their christian and surnames. At the date of the will the testator had a legitimate grandson named Rufus living in a foreign country, who, it appeared, he had only seen once when a child, about six years before making the will, and was never heard to speak of afterwards ; he also had an illegitimate grandson living with him, brought up and educated

by him, recognized as his grandson, and called Rufus. *Held*, (Street, J., *dissentiente*,) That there was nothing on the face of the will to shew that the testator intended the illegitimate grandson as his devisee. *Doe v. Taylor*, 1 *All.* 595.

*Held*, per Street, J., 1st. That from the whole context of the will, the words "grandson Rufus," taken in their strict primary sense as applicable only to the legitimate grandson, were not sensible with reference to the extrinsic circumstances proved, and that the Court might look to those circumstances to see if the words were sensible if applied to the illegitimate grandson. 2nd. That the words were ambiguous, and that evidence of the instructions given for the will was admissible to shew which of the grandsons was intended; and that the intention was a question for the jury. *Ibid*.

### 3—Estate for life.

A testator, after bequeathing to his wife all his personal property, gave to her all the rents and profits that should be derived from the lands at G. or elsewhere, that he should be possessed of at the time of his death. He then gave to his brother J. all the lands that should belong to him at his death, situated at G. or elsewhere, and in the event of surviving his brother J. he gave all the lands that should belong to him to his nieces. *Held*, That the words of the devise gave J. only an estate for life, and that no intention could be gathered from the will to extend it to an estate in fee. *Doe v. Green*, 2 *All.* 314.

4———Testator being seized in fee of the land after mentioned, devised (before the Act 1 Vic. cap. 9) as follows: "I give and bequeath to my wife the income of all my real estate during her life, and after her decease I give and bequeath to my son Benjamin F., my son James G., and my son Isaac P. my two lots of lands and the buildings thereon in Dock Street, to be equally divided between them." *Held*, That the sons only took life estates in the two lots after the death of the wife: *Doe v. Stanton*, 2 *All.* 632.

**5—Devise in trust for wife—Conditions—Remainder.**

A testator after directing that so much of his estate as was necessary, should be sold for payment of his debts, devised all the residue of his estate to his executors, in trust to hold for the separate use and benefit of his wife during her life or widowhood, and pay to her the income thereof; and after her death or marriage, then to be divided among the testator's children. *Held*, That the purposes of the trust did not require the estate of the executors to extend beyond the life of the widow; that at her death their estate terminated, and the testator's children took the estate in remainder. *Doe v. Driscoll*, 4 All. 176.

**6—Estate for life—Children.**

A testator devised as follows: "Also, I give to my son S. H. G. the use of my farm (describing it), also to his lawful children, and in case of his death without children, then to be equally divided between my five daughters (naming them) and their heirs for ever." When the testator died, S. H. G. had no child born; but his wife was then *enciente*, and a son was born shortly afterwards. S. H. G., at his death, left this son and four younger children surviving him. *Held*, That S. H. G., by this devise, took an estate for life, and at his death, all his children then living, an estate in fee. *Gourley et al. v. Gilbert et al.*, 1 Han. 80.

**7—Implication—Deed.**

A., by deed dated 2nd April, 1853, conveyed to his daughter a farm, described as the property purchased by him from B., except a part that he had before leased, to hold the same during his life; and after his decease, he thereby gave, granted, bargained and sold, to his said daughter, her heirs and assigns, "all the above mentioned premises, and every part thereof." The part excepted had been leased by A. to T. in 1851, for five years, with a covenant to renew or pay for improvements. In January, A. made his will, stating (*inter alia*) as follows: "I having already conveyed to my daughter E. S., her heirs and assigns, by

way of advancement, subject as in the deed thereof is mentioned, all that farm or tract of land situate, etc., formerly purchased by me from B., with all buildings, etc., to hold to her, my said daughter, her heirs and assigns, I do not make further mention of her, my said daughter, in this my will." *Held*—1st. That the testator's daughter took no estate under the will by implication; 2nd. That under the deed, she took the whole farm after the death of A. *Miles v. Coy and Fraser, Executors &c. of John Harding*, 1 Han. 174.

**8—Condition—Restraint of marriage—Widow's estate—Remainderman.**

A testator devised all his real and personal estate to his wife during her life of widowhood; but in case she married again, he willed that she should have only his personal property with his farm at Q., which she might sell at her discretion; he then devised to certain of his relatives the whole of his real property, of whatever nature and wherever situated, except the farm in Q. *Held*, That this condition was not void as being in restraint of matrimony, and that the widow's estate in the land therefore ceased on her marriage. *Doe dem. Livingstone v. Corrie*, 3 Kerr 450.

*Held* also, That ejectment might be maintained by the remaindermen against the person who married the widow without any demand of possession. *Ibid*.

The will contained a clause that any two of the devisees in remainder (some of whom were under age) should have a right to purchase the land at a valuation to be made by the executors. *Held*, That this did not prevent those devisees who were of age from disposing of their shares to a stranger, who might thereupon maintain ejectment against a person wrongfully in possession. *Ibid*

**9—Stock—Meaning of word.**

A testator devised a farm to his son, and by a codicil to his will, directed that the horses, stock, and farming utensils on the farm should remain thereon for the benefit of the farm; adding the words, "which I do give and

bequeath with the said farm." *Held*, That the word "stock" was not confined to live stock, but included the hay and crop grown on the farm, and which had been severed at the time of the testator's death. *Wetmore v. Ketchum*, 5 *All.* 408.

**Promissory notes bequeathed—Merged in subsequent judgments.**

Bank stock and promissory notes were bequeathed to an executor, with a direction that he should pay thereout all the testator's just debts. Between the time of executing the will and his death, the testator recovered judgments on some of the notes. *Held*, That such judgments did not pass to the executor under the bequest, but formed part of the residuary estate. *Ibid.*

**10—Devise in trust—Charge—Payment of debts.**

A testator directed that the residue of his real and personal estate should be divided into nine equal parts, and gave one-ninth to his executors, in trust to apply the rents and income thereof, for the support and education of his grandson, M. B., till he came of age, and then to convey the same to him absolutely; but in case his grandson died before he came of age, then such ninth part to be divided among the testator's children, share and share alike. By a codicil to his will, the testator declared that such devise in trust for his grandson, was to be held subject to the payment of a mortgage given to the testator by his deceased son W. H. B. (the father of M. B.), and to the other debts due from the estate of W. H. B. After the mortgage was given to the testator, W. H. B. conveyed the land on which it was secured to a trustee in trust to sell, and, in the first place, pay all his debts, and apply the balance to the use of his wife and son. M. B., the testator's grandson, died before coming of age. *Held*, That the testator's children, to whom the ninth was devised in case of the death of M. B., took it subject to the payment of the debts of W. H. B., and not merely as an auxiliary fund in case the property conveyed by W. H. B., in trust for payment of his debts, should prove insufficient. *Botsford v. Botsford*, 6 *All.* 458.



**11—Devise—Vested estate—Limitation over.**

A testator devised to P., his second wife, one-half of his real and personal estate, and directed that the children of his second wife should remain with her and enjoy all his real and personal estate till they were of age; after which, the other half of his estate should be equally divided between the children of his first wife; that the children of his first wife should assist his wife P., and her children, in all the work necessary to be done on his real and personal estate, till the children of his wife P. should be able to do the work themselves; and if the children of his first wife would not assist his wife P. and her children, they should have no part in his estate; but it should be given to those that would assist his wife P. and her children in the work which should be necessary to be done on his real and personal estate. *Held*—1st. That the children of the first wife took a vested estate in remainder in half the testator's land, after P.'s children came of age, dependent on the performance of the condition; 2nd. That the condition to assist P. and her children was a condition subsequent, and that before the estate of the children by the first wife could be forfeited by non-performance of this condition, it was necessary to shew a request for assistance by P. and her children. *Doe d. Myers v. Babineau*, 6 All, 89.

*Quere*, Whether the limitation over, in case of non-performance of the condition, was not void for uncertainty. *Ibid*.

**12—Devise to two persons in trust to sell—Conveyance by one.**

Where the devise was to two persons in trust to sell, and only one conveyed to the defendant, the other refusing to act, that conveyance passes at least an undivided moiety of the estate, so as to justify the entry of the vendee.

*Quere*, Whether the oral disclaimer of a devised estate is sufficient. *Hamilton v. Love*, 2 Kerr 243.

**13—Estate—Mortgage in fee.**

By the devise of an estate, which the testator has previously mortgaged in fee, nothing passes at law. *DeVeber v. Andrews*, 2 Kerr 604.

**14—Undue influence—Incapacity—Intention—Evidence.**

Where a will was contested by the heir-at-law, on the ground of undue influence by the devisee with the testator, but no evidence thereof was given, the Judge should not leave such a question to the jury. *Doe ex dem. Levi v. Samuel*, 1 Han. 265.

Letters written by a testator to his relatives before making his will, stating his intention to leave his property to them, are not admissible in evidence to defeat a will disposing of his property to another person; though the will is attacked on the ground of the testator's incapacity, as being in *extremis* at the time of its execution. *Doe ex dem. Levi v. Samuel*, 1 Han. 265.

**Trespass—Life estate in saw mill.**

See Trespass I. 17.

**15—Evidence—Certified copy of will.**

*Semble*, That a certified copy of a will cannot be given in evidence under the 1 Rev. Stat. cap. 112. *Connell v. Haley*, 4 All. 636.

**Will—Revocation—Previous contract.**

See Contract 14.

**16—Executors—Liability as contributories—Bank Stock undisposed of—Payment of legacies under Will not allowed against their contingent liability to calls.**

See Winding-up Act.

**17—Legatee—Action—Certain legacy.**

A legatee may maintain an action of debt against an executor for a certain legacy given by his testator. *Livingstone v. Powell*, Ber. 225.

**18—Devise subject to payment—Action.**

Where a devise of land is made to B., subject to the payment of a sum of money to A., and B. accepts the devise. *Quære*, Whether an action at law will lie under the Act of Assembly or at common law for recovery of the money? *DeVeber v. Andrews*. 2 Kerr 604.

**19—Legacy—Married women—Representative—Action.**

If a legacy is bequeathed to a married woman, who dies before any act done by husband to reduce it into possession, he can only maintain an action for it as the representative of his wife, though he may be beneficially entitled to it. *Collins v. Cahir*, 2 All. 103.

**Profits of Bank Stock—Payment to executor—Action**

See Assumpsit III. 14.

**Pleading—No averment of receipt of money.**

See Pleading I. 25.

**20—Reference—Inquiry into receipts.**

The plaintiff and defendant were executors of A., who bequeathed a legacy of £50 to the plaintiff's wife, charged upon land devised by the will to the defendant. On a bill filed for payment of this legacy, it appeared that the plaintiff, as executor, had received assets belonging to A.'s estate, which he had not accounted for, and that the defendant had in consequence been obliged to charge the real estate devised to him, to raise money to pay the testator's debt. At the hearing a reference was directed to inquire what moneys belonging to the estate had been received by the plaintiff, and how he had applied them. On appeal by the plaintiff from this order—*Held*, That the inquiry was proper; and that if the plaintiff had caused the fund from which the legacy was to be paid, to be used for the payment of the testator's debts, the defendant should hold that fund discharged from the legacy, or so much thereof as the plaintiff had virtually received from the assets in his hands. *DeVeber v. Andrews*, 3 All. 383.

**21—Creditor—Bequest to—Action.**

A bequest by a debtor to his creditor of a legacy to the amount of the debt, payable out of the proceeds of certain property which remains unsold, is no defence to an action by the creditor for his debt. *Bishop v. Robinson*, 1 Han. 68.

**22—Legacy—Bill to recover—Personal estate—Insufficiency.**

*Quere*, Whether, if in a suit to obtain payment of a

legacy, the bill shews the personal estate insufficient for payment of the debts, it must not also shew that the legacy was charged on the land, if the plaintiff seeks payment therefrom. *Wallace v. Woods*, 1 *Han.* 230.

**23—Execution of will before 1 Vic. cap. 9.**

A will made in 1835, before the new Wills Act. 1 Vic. cap. 9, was held sufficiently executed though the testator neither signed nor actually acknowledged the same in presence of the witness; the witness being called for the purpose of witnessing the testator's will and signed his name as a witness in the testator's presence; the circumstances amounting to an acknowledgement.

It was also held that the 26, Geo. III. relating to the execution of wills must be read subject to the Imperial statute 25 Geo. II. cap. 6. *Doe dem. McVey v. Daniel*, 2 *Pug.* 372.

**24—Interlineations.**

Where interlineations appear in a will which are not noted, after long lapse of time a strong presumption may be raised that they were made before or after the execution of the will according as the possession, title, &c. have run, and as the parties interested have acted. *Ibid.*

**25—Attestation—Marksmen—Identification of will.**

Where three persons witnessed the execution of a will, two of whom signed by their marks and were unable to identify the will produced, but the third did so and also proved the marks of the others. *Hell*, That this proof was sufficient to entitle the will to probate.

It is no objection to an attestation by a marksman that his hand or pen was guided by another. *Thomas Hanlon, in re will of*, 2 *Pug.* 136.

**26—Necessity of testator being able to see witness Sign—Mental capacity—Onus of proof.**

It is not sufficient that a testator be in the same room with the witnesses when they are subscribing their names to the will, but he must be both able to see them sign, and also mentally capable of understanding what is being done.

To constitute a sound disposing mind, a testator must have capacity to comprehend and deal with subjects requiring thought, reflection, memory and judgment. The proof of the due execution of a will eminently lies on him who sets it up, and it is more fatal to him than his adversary if he leaves difficulties entirely without explanation. *Doe dem. Violette v. Therrian*, 1 P. & B. 389.

**27—Paper intended as will—Unfinished [state—Necessity of establishing testamentary capacity.**

The presumption is always against the validity of will which bears self evident marks of its being unfinished, and it behooves those who assert its testamentary character to shew distinctly that the deceased intended the paper in its actual condition to operate as his will.

The testator wishing to make his will, had a paper drawn up for that purpose but did not complete it. It ended with the word "fourthly" and it was clear that he intended to add something else. Afterwards, and shortly before his death, his nephew who had written the paper brought it to the testator who executed it, the testator was very weak but the evidence was contradictory as to his testamentary capacity. *Held*, (per Allen, C. J., Wetmore and Duff, J. J., Fisher, J., *diss.*) that as the will was executed in an unfinished state and was brought to him for execution without any previous request proceeding from him, his testamentary capacity must be most clearly established, and that as this had not been done the will could not be set up. *In re Gilberts' will*, 1 P. & B. 525.

**28—Construction—Life estate—Leasing property—Covenant — Estoppel on Lessee — Remainder man carrying away his interest—Party to suit.**

R. devised as follows: "I give to my dear wife, M. the possession, use and occupation of my moiety of the house in which I now reside, and also my moiety of the upland marsh \* \* \* and also all the plate, linen, goods, chattels and effects, together with all the household furniture of which I shall be possessed at the time of my decease; as also the rents and profits of all my other per-

sonal and real estate whatsoever, whether consisting of land, tenements, goods, chattels, debts, moneys, or choses in action, including all that I may own in the world at the time of my death for the support and maintenance of herself and such of my younger children as shall be living with her and still unmarried. \* \* \* It is further my will that if the rents and profits of my real and personal estate be not sufficient for the maintenance and support of my said wife and younger children, she may from time to time employ such of the principal as may be necessary for that purpose. It is also my will, and I hereby direct that whatever of my real or personal estate may remain after the death of my said wife, and which has not been previously otherwise disposed of in this will, shall be equally divided, share and share alike, between my children.

After the testator's death, M. leased a portion of the property to the defendant, under a demise containing various covenants, for a term which extended beyond M.'s life. M. having died, the defendant refused to perform his covenants, alleging that the lease was determined by her death. In an action brought by the children of R., the remainderman named in the will, it was *Held*, 1st, That M. only took a life estate under the will. 2nd, That she had a power of sale both of the real and personal estate, and, as included in this, also the power to lease. 3rd, That while it was open to the defendant to shew that M. had only a life estate, by accepting the lease from her, and entering under it, and continuing in possession of the property, he was estopped from disputing that she had title to lease, either because the will did not authorize a lease under any circumstances, or because the power was only to be exercised in case the rents and profits of the property were insufficient for the maintenance of the family. 4th, That in an action for rent which accrued due, or for any cause of action which arose after one of the remaindermen conveyed away his interest, he should not be a party.

Evidence of Commissioners of sewers appointed under

Act of Assembly, acting in that capacity is *prima facie* sufficient. *Knapp v. King*, 2 *Pug.* 309.

**29—Condition as to permanent settlement by devisee—  
Effect of death of devisee.**

J. M. senior devised land to T. M., and also provided that J. M. junior should have full possession and control of the property until T. M. should settle permanently thereon. T. M. died in about two years after the testator's decease without having made a permanent settlement. The heir of T. M. having brought ejectment against J. M. jun. *Held*, 1st, That on T. M.'s death the fee passed to his heir 2nd, That the latter could bring ejectment without previous demand of possession. *Doe dem. Murray v. Murray*, 2 *Pug.* 361.

**30—Testamentary capacity—Eccentricities.**

The temperament of a testator may be nervous and flighty, his conduct may be frivolous and capricious, and may also be excitable and impulsive, but all these defects will not destroy his testamentary capacity; and the true test of unsoundness of mind, which in almost every case will be found sufficient, is, Was the testator laboring under delusion at the time the will was made?

Where a Judge of Probates refused Probate of a Will, on the ground that the testamentary capacity of the deceased, though her normal state of mind was sufficiently sound to give testamentary capacity when acting at its best, was at times temporarily destroyed on account of the latent morbid state of the faculties of the deceased, leading at times to eccentricities, and at other times to insane action, and that the will in question was executed under the influence of these morbid manifestations or some of them; and on appeal this decision was reversed, and the will ordered to be admitted to Probate, the costs of the contestant of the will in the Court below and on appeal were allowed out of the estate. *Re will of Hasen*, 3 *Pug.* 329.

**31—Stock devised in trust—Shares allotted from accumulated profits—"Dividends Interest and Annual produce"—What included by words.**

S. W. being at the time of his death possessed of 60

shares of the capital stock of the Bank of New Brunswick, devised the same (with Water Debentures, bonds and mortgages, &c.) to the defendants, his executors and trustees, to pay annually to G. W. a certain sum; and to pay and apply to the plaintiff from time to time, the whole remaining "dividends, interest and annual produce of the said several trust moneys, stocks, bonds, debentures, mortgages, and securities."

The testator died on the 22nd May, 1868. In December, 1869, the Shareholders of the Bank, at a meeting called for that purpose in pursuance of the provisions of an Act of the Parliament of Canada (32 and 33 Vic. cap. 57), declared it expedient to increase the Capital Stock of the Bank by the sum of \$300,000 from the accumulated profits, and that the Directors allot to each of the present shareholders one share for each two now held by such shareholder. *Held*, that the plaintiff was not entitled to receive the additional shares so allotted, absolutely, as being a part of the "dividends, interest, and annual produce" of the shares so bequeathed. *Wiggins v. Scovel*, 2 *Pug.* 31.

**32—Real and personal estate—Mortgaged property—Right of devisee to have mortgage paid out of personal estate—whether such should be done before payment of legacies—Charging residuary estate with payment of debts—Sufficiency of words—Power to sell.**

A testator by his will devised certain property, both real and personal, to his executors in trust to sell the same and invest the proceeds in good securities to form part of his residuary estate; and he provided that, after payment of his debts, funeral and testamentary expenses and certain legacies, such residuary estate should be divided among the legatees in proportion to the amounts of their respective legacies as previously specified. Another portion of his real estate was devised to F. in trust to apply the rents and profits to the benefit of his wife and children, giving him no power of alienation and restricting the terms of leases to be given by him to one year; this devise was also on condition that F. should, out of the rents and profits,



pay to the sister of the testator an annuity of £75 during her lifetime. The property so devised to F. was mortgaged: *Held*, That F. was entitled to have the mortgage paid by the executors out of the residuary estate.

A testator, with regard to the disposition of his residuary estate, used the following words: "As to all the rest, residue and remainder of my real and personal estate and effects whatsoever, which shall remain after payment of my just debts, funeral and testamentary expenses, and the several legacies or sums in gross, hereinbefore mentioned and directed to be paid, I give, devise and bequeath the same," &c. *Held*, That these words were sufficient to charge the residuary real estate with the payment of the debts and legacies, and that the executor had power to sell. *McLeod v. Frith*, 3 *Pug.* 453.

**Certified copy of will cannot be given in evidence in action affecting real property.**

*Knapp v. King*, 2 *Pug.* 309.

### WINDING-UP ACT.

**1—Judge's order—Authorising calls, evidence—Judge's signature.**

In an action against a stockholder for calls under the Winding-up Act, the order of a Judge of the Supreme Court, authorising such calls is *prima facie* evidence of the defendant's liability. *McKenzie, Curator etc. v. Scovil*, 2 *Han.* 6.

**2—**A Judge *ut nisi prius* is bound to take judicial notice of the signature of another Judge of the Court, in an order made under the Winding-up Act. *Ibid.*

**3—Stockholders—Liability.**

The stockholders of the Westmorland Bank, by their charter, in addition to the liability in respect of the stock held by them for payment of the debts of the bank, are liable in their private and individual capacity for an amount equal to the sum of their stock. *McKenzie, Curator of Westmorland Bank v. Wiswell*, 1 *Han.* 503.

**4—Executors—Liability—Register.**

The executors of the estate of C. invested a portion of

its funds in bank stock in their own names, but for the benefit of the estate, by which the dividends were received. After their death their representatives, by writing, agreed to transfer the stock to the widow of C., who had taken out letters of administration *cum testamento annexo de bonis non*. The stock certificates were handed over to her, and she afterwards received the dividends, but no transfer was made on the books of the bank as required by its charter and bye-laws. The bank suspended, and the estates of the executors were placed by the Judge on the list of contributories for the stock standing in their names on the register. *Held*, That they being *prima facie* legally liable, the Judge was right in not altering the register by substituting the name of the party equitably entitled to the stock. *In re President &c. Westmorland Bank ex parte Allison*, 1 *Han.* 506.

#### **5—Executors—Liability.**

A testator died possessed of Bank Stock, which his executors allowed to remain undisposed of, and received the dividends. By the terms of the Bank Charter the stockholders were individually liable for the payment of the debts of the Bank, in proportion to the stock they held. About two years after the death of the testator, the Bank suspended payment, and was wound up under the Act 27 Vic. cap. 44, and a call made on the executors as contributories. *Held*, That they were liable therefor in their representative capacity, and that the payment of legacies under the will could not be allowed against their contingent liability to calls under the charter. *McKenzie, Curator etc. v. King*, *Mich. T.* 1871.

#### **WINDOWS.**

*See* Lights.

#### **WITNESS.**

##### **1—Scientific Witness—Questions.**

A scientific witness cannot be asked questions, the answers to which are based upon previous evidence given by other witnesses, and upon which conclusions are drawn which are for the jury to determine. *Key v. Thomson*, 2

*Han.* 224. See also Evidence VIII. 80. *Napier v. Ferguson.*

**2—Joint indictment—Wife of one prisoner offered as witness for another.**

A. and B. were tried together on a joint indictment for assault on a peace officer, and the wife of A. was offered as a witness to disprove the charge against B. *Held*, That her evidence was properly rejected, but had the husband not been on his trial, she would have been a competent witness. *The Queen v. Thomson and Conroy*, 2 *Han.* 71. (See also *The Queen v. James Thomson et al.*, L. R. C. C. vol. 1 page 877.

**3—Deceased witness—Evidence on former trial.**

Where the evidence of a witness taken on a former trial in the same cause and since deceased, was read from the Judge's notes, the defendant's counsel offered evidence to shew a statement made by the witness while giving his evidence in the presence of the plaintiff. *Held*, That the evidence was properly rejected. *Prescott v. Walton*, 2 *Han.* 230.

**4—Credibility of—Cause left to jury upon.**

Where the maker of a promissory note set up infancy as a defence against the indorsee, and the only witness to prove the infancy was the payee of the note, who was a brother of the maker, and who had himself indorsed it to the plaintiff: the Court refused to disturb a verdict in favor of the indorsee, although the witness was not contradicted or otherwise discredited than by the above circumstances, the Judge having left the case to the jury upon the credit of the witness. *Bugbee v. McDonald*, 2 *Kerr* 61.

5—Where a cause depended on the testimony of one witness, whose credibility was properly left to the jury, and they found a verdict against his evidence, the Court refused to grant a new trial. *Wortman v. Marter*, 3 *All.* 809.

**6 - Holding communication with party in suit.**

Where a witness under examination *de bene esse* before a Judge had held communication relative to the suit with one of the parties during an adjournment of the examination, notwithstanding a caution to the contrary given him

by the Judge, it was held not a sufficient ground for suppressing the examination. *Doe dem. Beatty v. Keillor*, 2 Kerr 648.

### 7—Contempt—Attendance—Subsequent Absence.

A subpœna to attend on the 10th September, and so from day to day until the cause was tried, was served on the 11th September, and the witness attended for several days, and knew the cause was not tried: *Held*, That he was guilty of a contempt in subsequently absenting himself. *Johnston v. Wiliston*, 2 All. 171.

Where a witness accepted the conduct money, and went with the person who served him with the subpœna, and remained at the Court several days, an attachment was granted against him for subsequently absenting himself, though he and another person swore, in contradiction to the party who served the subpœna, that the original writ was not shewn to him, and he also swore that he attended the Court as a juror, and left in consequence of ill health, with the intention of returning,—his absence appearing to be wilful. *Ibid*.

### 8—Counsel—Witness.

A counsel in a case will not be allowed to be a witness for his client, unless there is other counsel to examine him and comment on his testimony. *Hamilton v. McLean*, Hil. T. 1828.

**s a**——Though the practice of counsel in a cause giving evidence is most objectionable, yet a Judge at *nisi prius* has no authority to refuse it if offered. *Bank of B. N. A. v. McElroy*, 2 Pug. 462 See New Trial II. 28. *Shields v. McGrath*.

### 9—Prosecution for Solemnizing Marriage—Criminal proceedings.

A prosecution to recover a fine under 1 Rev. Stat. cap. 146, for solemnizing marriage between minors without consent of their parents is a "criminal proceeding," and therefore the defendant is not a competent witness under the Act 19 Vic. cap. 45. *Ex parte Jarvis*, Hil. T. 1861.

**10—Bastardy.**

Bastardy not a criminal proceeding—party charged, a competent witness. *Ex parte Cook*, 4 All. 506.

**Recalling witness.**

*See Evidence VIII.*

**11—Diligence in discovering.**

Whether due diligence has been used to discover an attesting witness must depend on the circumstances of the case. *Crane v. Cyr*, 2 All. 577.

**12—Subscribing witness—Assignment of judgment.**

Affidavit of subscribing witness necessary before attorney compelled to pay over the proceeds of a judgment at the instance of the assignee. *Murray v. Johnston*, 1 All. 667.

**13—Witness called by party, proving hostile.**

If a witness called to prove a case unexpectedly gives evidence in opposition to it, the Judge may allow the party calling such witness to treat him as hostile and cross-examine him, though the effect of doing so may be to discredit his testimony. *Davidson v. Arseneau*, 5 All. 289.

**14—By-law, corporation of Saint John—Recovery of penalty—Defendant a competent witness.**

The proceeding for the recovery of the penalty being in nature of a civil suit and not a criminal proceeding, the evidence of defendant is admissible under 19 Vic. cap. 41, (Consol. Stat. cap. 46). *Ex parte Trask*, 1 P. & B. 277.

**15—Illegally solemnizing marriage—Fine—Defendant not a competent witness.**

The prosecution for the recovery of the fine imposed by the Rev. Stat. cap. 146, sec. 3, (Consol. Stat., page 1083) being a criminal proceeding the defendant is not a competent witness under the Act 19 Vic. cap. 41, (Consol. Stat. cap. 46.) *Reg. v. Gollant*, 5 All. 115.

**16—Interested witness—Estate of deceased person—uncorroberated testimony.**

When it is sought to fix the estate of a deceased person with a liability upon the uncorroberated evidence of an interested witness, the evidence ought to be very clear and free from suspicion. *Ex parte Simpson*, 2 Pug 146.

**17—Fees—Attorney in cause.**

Attorney in cause not allowed fees as witness it being his duty to attend the trial of cause. *Jones v. Botsford*, 1 P. & B. 581.

**18—Credibility of witness a question for jury.**

The credibility of witnesses is altogether a question for the jury, but a different rule prevails where there are writings which tend to confirm the testimony of one side or other. *Smith v. Andrews*, 1 P. & B. 541.

**19—Person appearing as proctor for another.**

It is not a valid objection to a witness in the probate Court that he appeared as proctor for another person interested in the estate. *Re Stockton Ex parte Roach*, 1 Pug. 142.

**Subscribing witness to deed—Insufficiency of proof by, for purposes of registry.**

See deed I. 46. *Doe dem. Catherine v. Turnbull*.

**Privilege.**

See Arrest.

**Expenses.**

Witness attending trial as a juror or too much intoxicated to be examined, cannot recover his fees.

See Costs II. 37.

**Taxable expenses—Cause put off on payment.**

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**Materiality of witness.**

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See. Costs II. 39.

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<i>Reg. v. McCoubrey,</i>	..	..	3 <i>Kerr</i> 384.
<i>McLardy v. Flaherty,</i>	...	...	3 <i>Kerr</i> 455.
<i>Vanwart v. Roberts,</i>	...	...	3 <i>Kerr</i> 572.
<i>Harkins v. Johnston,</i>	...	...	1 <i>All.</i> 70
<i>Kerr v. Morrison,</i>	..	..	1 <i>All.</i> 378.
<i>Doe v. Gilbert,</i>	...	..	1 <i>All.</i> 520.
<i>Whelpley v. Riley,</i>	...	...	2 <i>All.</i> 275.
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**WORDS (MEANING CONSTRUCTION.)****"Adjacent and adjoining" — Distinction.**

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**"At least" day's service.**

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*See* Covenant 2.

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*See Steen v. Sanson*, 4 All. 589.

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**"Distress"** a "proceeding" under Act 18 Vic. cap. 38.

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**"For a Glebe"** grant of land to use of rector.

*See* Crown Grant II. 8.

**"Grandson."**

*See* Evidence V. 8.

**"Incapacitated."**

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**"Months."**

*See* Insurance 40.

**"Within three months"**—Filing bill in equity.

*See* Practice in Equity.

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**"Privileges and Appurtenances"**—"Other privileges"  
What is conveyed.

*See* Deed I. 5, 21—Easement 1.

**"Water privilege."**

*See* Easement 2.

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**"Sell"** necessarily meaning to convey.

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**"Stock"** not confined to live stock.

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**"Sue for" and "recover" indicate a proceeding in personam.**

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**"Real and personal property" in 1st section of Act 33 Vic. cap. 46, are limited and explained by sec. 2.**

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**"Nearest Justice of the Peace" means nearest [dis-interested] Justice.**

*See Justice of the Peace II. 16.*

**"Properly planked or timbered on the surface" not proved by evidence that wharf was in good order.**

*See Wharfage 2.*

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*See Variance 5.*

**"Purchase" does not necessarily imply a conveyance.**

*See Warranty 6. Ash v. Clark.*

**"Commercial traveller" is engaged in an "occupation" or "calling."**

*See British North America Act 12. Fairbairn ex parte.*

**"Dividends, interest and annual produce."**

*See Will 81. Wiggins v. Scovil.*

**"Persons," legal interpretation of that word in Acts of Legislature includes bodies corporate.**

*See Election 5 Regina v. Reed.*

**"Pavement."**

*See Statute 4.*

**"Responsibility" and "liability".**

*See Shipping Law 18.*

**"May" construed "must" in Statute.**

*See Statute 8.*

**"Person carrying on business."**

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## WRIT.

**" Amendment—Practice—Sheriff.**

**Altered fi. fa.**

A returned *fi. fa.* having been altered and reissued by the attorney, as an alias, was held void and not receivable in evidence in an action of trespass against the Sheriff for taking goods under it. *Johnson v. Winslow*, Ber. 53.

Mistake in endorsement by Sheriff may be amended. *Id.*

Return by Sheriff "*cepi corpus*" on *capias* issued against two defendants, applicable to both. *Rex v. Sheriff of Gloucester*, Ber. 187.

**Issue of.**

In the absence of evidence of the actual time of issuing a writ of *mesne* process, it will be presumed to have been issued on the day it bears date. *Pomares v. Provincial Insurance Co.*, Hil. T. 1873.

Alteration made in the return day of writ, though before it is returnable, vitiates it, unless it is resealed. *Andrews v. McKenzie* 1 All. 264.

When writ not served personally, the affidavit should state the name of the person upon whom it is served. *Sandall v. Godsoe*, 1 All. 44.

**Writ not served personally—No Judge's order to perfect service.**

*See Practice VI 16.*

**Continuance.**

*See Judges Order 7.—Practice IV. 12.*

**When considered issued—Certificate of Attorney.**

Where a writ was made out and tested on the 11th June, and remained in the Attorney's office until the 25th, when he served it on the defendant. *Held*, that it was not issued until the 25th, and the Attorney having taken out his certificate before that day, though after the writ was made out, the writ was valid. *Seelye v. Bliss*, 1 P. & B. 53.

**WRIT OF ERROR.**

*See Error (Writ of.)*

**WRIT DE PROPRIETATE PROBANDA.**

“ Replevin—Sheriff.

**Issue by attorney's clerk.**

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**1—Adjoining land owners—Defendant allowing cellar to remain after building destroyed—Water collecting and running against plaintiff's wall—Plaintiff's default—When action not maintainable.**

The ordinary and legitimate use of one's own land will not constitute an injury for which an action on the case for damages will lie, nor for default of defendant in not doing what he is not by law required to do.

Therefore where defendants owned a town lot on which there had been a house with a cellar underneath it, and the house being destroyed by fire, the cellar was allowed to remain uncovered, and plaintiffs erected a building on the adjoining lot and sank their foundation walls to a lower depth than defendant's cellar, so that water collecting in the cellar flowed to and against plaintiff's wall and damaged it. *Held*, That defendants were not liable. *Trustees of St. John's Young men's Christian Association v. Hutchinson, et al* 2 P. & B. 523.

**2—Tort—Duty arising out of contract of employment**  
**Traversing the employment, the proper mode of denying the existence of the duty to use due diligence.**

The first and second counts of the declaration stated an

employment of the defendant by the plaintiff and other owners of the vessel—the defendant himself being a joint owner—to launch the vessel for a reward to be paid therefor, and that thereupon it became and was the duty of the defendant to use due skill, care and diligence for the purpose aforesaid, yet the defendant did not use due care and skill, &c.

*Held* on demurrer to pleas denying the employment as alleged that it was in respect of the alleged employment of the defendant that the supposed duty to take due care, skill and diligence arose; and without such an averment the declaration in tort would have been bad, and that a traverse of such employment was the proper mode of denying the existence of the alleged duty. *Domville v. O'Brien*, 2 P. & B. 656.

**Joint owners in vessel—Action by owner against joint owner for taking vessel and launching her in a negligent manner—Joint ownership no answer to action.**

To a count alleging that the defendant took the plaintiff's property in a certain vessel, and so negligently launched and managed the said vessel that she was damaged, and the plaintiff's property in her was lessened in value to him, the defendant pleaded in answer, the joint ownership of the plaintiff and himself of the property in question.

*Held*, That the plea was no answer to the action.—As long as tenancy in common exists, one tenant in common cannot maintain trover against the other; but when negligence of an active nature amounting to misfeasance is shewn, one tenant in common is liable for the misuse of the property, it is a wrong for which there should be a remedy. *Ibid*.

**3—Corporation Saint John City—power to raise level of the streets—Evidence of exercising powers carelessly— withdrawing evidence of same from Jury—Setting aside non-suit.**

By the charter of the city of St. John the Corporation were given power to alter amend and repair streets there-

tofore laid out, or thereafter to be laid out. The charter is confirmed by 26 Geo. III. cap. 46, and the right to alter the levels of streets is recognized by 9 Geo. IV., cap. 4. Church street was not one of the streets originally designated by the plan of the City. It was made a public street in 1811, on petition of the owners of the land through which it passes, who gave the land for the street. In 1874 the Corporation raised Church street, below Canterbury street, filling it in to within four or five feet of the plaintiff's house and shop. On the embankment so made in front of the plaintiff's house and shop, the Corporation erected a fence. By reason of this, the plaintiff had no access from his house and shop to the street, but reached them by the narrow passage left next the house and shop running easterly toward Canterbury street and westerly toward Prince William street. An action having been brought against the Mayor, &c., of the City for the damage sustained by the plaintiff by reason of so filling in the street and erecting the fence, in which the plaintiff was non-suited, on a motion to set aside the non-suit, it was *Held* (by Weldon, Fisher, and Wetmore, J. J., Allan, C. J., and Duff, J., dissenting) that the Corporation had no right to fill in the street in the manner in which they did it, and to erect the fence on the embankment in front of the plaintiff's house and shop, and that the manner in which the Corporation had filled in the streets and erected the fence was of itself evidence that they had acted carelessly and without reasonable skill and care and that the consideration of this should not have been withdrawn from the jury. *Pattison v. Mayor &c. St. John*, 2 P. & B. 686.

**4—Obtaining injunction—Averment that same was obtained wrongfully and maliciously, &c.**

No action will lie for obtaining an *ex parte* injunction order from a Judge, even although it was done maliciously, unless the Judge was induced to grant it by false representations. *Quare*, Whether an allegation that defendant falsely procured the injunction order to be made would be sufficient on demurrer. *Collins v. Everett*, 2 P. & B. 469.

**Master and Servant—Injury to servant—Death of Master—Survival of action.**

See Master and Servant. (*Addenda*,) *Connolly v. Shives*.

**AFFIDAVIT.****1—Foreign Company—Attaching order—Right to sue by name, or its incorporation, must be shewn by the affidavit.**

In an action brought by a non resident Company, an attaching order was obtained under cap. 43, Con. Statutes but the affidavit on which it was granted did not shew that the plaintiffs were incorporated, or had any right to sue by that name. *Held*, that the affidavit was bad and the attaching order was set aside. *Avon Stone Co. v. Dunham*, 2 P. & B. 460.

**Attaching order.**

Affidavit for procuring same need not negative the fact of claim being secured or deny the intention to vex and harrass the defendant as provided for in cases of writ of attachment. *Ibid*.

**2—Attachment Law—Omitting to state in affidavit that plaintiff's claim is not secured.**

Where a writ of attachment was issued upon an affidavit, in which it was not stated that the claim was not secured by a mortgage, pledge or lien, &c., as required by Consol. Stat. cap. 42, sec. 3, it was held that the failure to comply in that respect with the statute was not a mere irregularity, but that the writ was a nullity. *Burke v. Clarke*, 2 P. & B. 662.

Writ of attachment if good on its face is a sufficient justification to Sheriff although actually void. The Sheriff is not bound to examine the affidavit attached to the writ. *Ibid*.

**3—No statement of total amount—Statements in detail—Statement of no agreement that attachment should not issue—Description of particulars of demand.**

It is no objection to an affidavit for attachment that it does not state the total amount for which attachment is to issue, provided it states in detail the several sums in which defendant is indebted to plaintiff.



It is sufficient for plaintiff to state that no agreement was entered into by him or by any person on his behalf whereby no attachment should issue &c.

It is correct to describe the particulars for which attachment issues as the—"particulars of plaintiff's demand in this action." *Cahill v. Cahill*, 2 P. & B. 498.

#### APPEAL.

**Equity Court—Question of costs—Whether Appeal will lie.**

*See Costs, (Addenda.) Sayre v. Harris.*

#### ARREST.

**Arrest—Previous arrest for same cause of action—Res adjudicata—Discharge from custody—Splitting up claims—Whole amount due at time of first suit.**

A suit or proceeding may not relate to *res adjudicata* and yet it may be vexatious and there is no necessary connection between the vexatious character of a proceeding and the fact that the subject of it had, or had not, been previously adjudicated upon. Therefore where plaintiff arrested defendant for \$68,000 for money had and received and proceeded to judgment, and subsequently arrested defendant in this suit for \$20,000 which it was shewn was due at the time of the commencement of the first action but was not included in it; *Held* that the defendant was entitled to be discharged from custody. *National Park Bank v. Ellis*, 2 P. & B. 547.

*Held* by *Weldon, J.*, that an arrest for an amount—"United States currency"—without a Judge's order is bad. *Ibid.*

The right to arrest in actions of *tort* is not taken away by the Consolidated Statutes. *Mullin v. Frost*, P. & B. 468.

#### ASSESSMENT.

**Statement—Ambiguous and uncertain—Requisite information not furnished—Right of Assessors to assess.**

Where Assessors under authority of Act 81 Vic. cap. 86, sec. 4, required the manager of a bank to furnish them

“a true and correct statement in writing—under oath—setting forth the whole amount of income received for such bank within the city of St. John for a fiscal year preceding 1st May 1877,” and the Manager rendered a statement as follows “net profits or income derived from business done within the city—Nil.” Held that as he had treated the terms “Income” and “Net profits” as synonymous the statement was uncertain and ambiguous and that the assessors were justified in ignoring it and assessing the manager according to the best of their judgment. *Lawlers Ex parte*, 2 P. & B. 520.

#### ASSUMPSIT.

**Delivery and acceptance of goods subsequent to time agreed upon for delivery—Cannot be set up as a defence, or in reduction of damages.**

Where it is agreed that goods shall be delivered at a certain time and the defendant subsequently to the time agreed upon with a full knowledge of all the facts, thinks proper to accept delivery of the goods, he cannot set up the non delivery at the specified time as a defence to the action, or in reduction of the value of the goods. *Moffat v. Lunt*, 2 P. & B. 678.

#### ATTACHMENT.

**Contempt of Court—Injunction order—Disobedience not wilful.**

Where a Judge sitting in Equity being satisfied that a breach of an Injunction order by the defendant was not wilful, declined to make an order for his imprisonment, the Court on Appeal refused to disturb the judgment of the Court below. *Sayre v. Harris*, 2 P. & B. 677.

#### ATTACHMENT LAW.

**Statement of amount in affidavit—Statement of no agreement &c.—Particulars.**

*See Affidavit, (Addenda.) Cahill v. Cahill*, 2 P. & B. 498.

**Requisites of affidavit.**

*See Affidavit, (Addenda.)*

#### ATTORNEY.

**Collecting money.**

Although an Attorney who has collected money may be

made to account therefor in a civil action the Court will compel him to do summary justice without putting the client to the necessity of bringing an action. *Ex parte Kerr & Thorne*, 2 P. & B. 625.

Application made by name of firm of Attorneys. *Ibid.*

**Agency of Student at law in office of principal—Continuance of Agency—Money paid to Student after becoming attorney—Occupying same office.**

See Principal and Agent, (Addenda.) *Eastern Township Bank v. Hannington.*

### BILLS AND NOTES.

**Pecuniary interest—Action by person having none—Consideration—Allowing plaintiff to affix stamps on trial.**

Action on a promissory note dated January 17, 1874, made by Q. for \$200 payable to the order of T. three months after date. The note was given by defendant in payment of his father's debt. It was not stamped when given. T. knew that it required to be stamped, and subsequently put on double stamps in order "to make it legal in case of his death," as he alleged. The stamps purported to be cancelled on February 24, 1874. F. sold the note after it was due, to N. for \$15, and at the latter's request the plaintiff allowed the action to be brought in his name. The plaintiff had no pecuniary interest in the note. Objection being taken on the trial to the sufficiency of the stamping, the plaintiff testified that he was not aware until then that the note was not properly stamped, and the Judge without requiring N., the real owner of the note, to be called as a witness, allowed the note to be double stamped on the trial. *Held*, (by Weldon, Fisher and Wetmore, J. J., Duff, J., dissenting), That the Judge was right in allowing the plaintiff to put double stamps on the note on the trial. *Held*, That the plaintiff had such an interest in the note as entitled him to recover thereon. *Held*, That the note having been given by the defendant for his father's debt, it was not invalid for want of consideration. Duff, J., *Held*, That the note when it came into N.'s pos-

session bore its condemnation on its face, and in this important particular the case was distinguishable from *Leonard v. Foshay*. That N. could not stand in respect to it in any better position than T., and it was clear T. could not have recovered upon it. *Street v. Quinton*, 2 P. & B. 567.

### BREACH OF PEACE.

**Assault on wife by husband is breach of peace**

*See Husband and Wife, (Addenda.) Ex parte Abel*

### BRITISH STATUTES.

#### Mortmain.

The Statute of Mortmain 9 Geo. II. cap. 36, is not in force in this Province. *Doe dem. Hasen v. Rector, &c. St. James' Church*, 2 P. & B. 479.

### BY-LAW.

**St. John Common Council—Power to pass by-law to imprison.**

The Common Council have no power to pass a by-law subjecting persons to imprisonment for non-payment of a pecuniary penalty, except contingently in case goods and chattels cannot be found on which to levy. (*Ex parte Trosk* confirmed.) *Regina v. Gilbert*, 2 P. & B. 619.

### CARRIER.

**Carriers—Liability—Forwarding by company beyond terminus — Contract — Conditions—Notice—Right of Carrier to impose conditions and stipulations — Loss by fire.**

Defendants own a line of railway between Montreal and Portland, Maine. One B. forwarded from Montreal by their line some cases of goods addressed to plaintiff at St. John, N.B. The goods belonged to plaintiff, having been purchased for him by B. The Company's receipt stated that the goods were to be sent subject to certain conditions on the back, which provided (*inter alia*) that the Company should not be responsible for damages occasioned by delays from storms, accidents, over pressure of freight, or unavoidable causes, or for damages from the weather, fire, heat, frost or delay of perishable articles, or from civil commotion—that all goods addressed to con-

signees at points beyond the places at which the Company have stations, and respecting which no directions to the contrary shall have been received at these stations, will be forwarded to their destination by public carrier or otherwise, as opportunity may offer, without any claim for delay against the Company for want of opportunity to forward them; or they will, at the discretion of the Company by whom they may have been received, be suffered to remain on the Company's premises, or be placed in shed or warehouse, pending communication with consignees, at owner's risk; and that the defendants will not be responsible for any loss or damage to goods so sent, nor for any delay which happens beyond their line. The goods arrived at Portland, the terminus of defendants' railway, and were stored in their warehouse there, and were destroyed by fire on 9th August, without any negligence on part of defendants. In an action on the case to recover damages for loss of the goods: *Held*, That defendants' liability as common carriers ended at Portland; and that the agreement to forward the goods to their destination as opportunity might offer, did not render them subject to the common law liability of carriers.

Where plaintiff's agent had the means of knowledge of conditions endorsed on a way bill, plaintiff is bound by them.

A carrier clearly has a right to stipulate against a liability for loss by accident. *Armstrong v. The Grand Trunk Railway Company*, 2 P. & B. 445.

#### CERTIORARI.

**Copy of proceedings—Production—Necessity of.**

*Quere*, Whether a party applying for a *certiorari* should not produce a copy of the proceedings before the Justice, or account for his not doing so. *Ex parte Abel*, 2 P. & B. 600.

#### CONTEMPT OF COURT.

**Disobedience not wilful.**

*See Attachment, (Addenda.) Sayre v. Harris.*

**CONTRACT.**

**Acceptance of goods subsequent to time agreed upon for delivery—When cannot be set up as a defence or in reduction of damages.**

*See Assumpsit, (Addenda.) Moffat v. Lunt.*

**CORPORATION.**

**Right of Corporation of Saint John to fill in street and erect fence.**

*See Action on Case—Negligence, (Addenda.) Pattison v. Mayor, &c. St. John.*

**By-law—Power to pass, subjecting persons to imprisonment.**

*See By-Law, (Addenda.)*

**Foreign Corporation—Necessity of shewing right to sue, or incorporation.**

*See Affidavit, (Addenda.) Avon Stone Co. v. Dunham.*

**COSTS.**

**Reserving question of allowance of costs—Appeal.**

Where a Judge in Equity reserved the question of costs on refusing to make an order for imprisonment for breach of an injunction order, it was *Held*, That the Court on appeal could make no order concerning the costs in the Court below.

*Quere*, Wetmore, J., whether an appeal from the Equity Court will be allowed on a question of costs, except under very peculiar circumstances. *Sayre v. Harris*, 2 P. & B. 677.

**CRIMINAL LAW.**

**Indictment—Omission of word “feloniously”—Effect of—Reserving question for consideration of Court—Words “during trial” in Rev. Stat. cap. 159. sec. 22.**

An indictment charged that “the prisoner did steal, take and carry away, &c., without charging that it was done feloniously. Before pleading, the prisoner’s counsel moved to quash the indictment. After argument, the presiding Judge allowed the indictment to be amended under 32 & 33 Vic. cap. 29, sec. 32, by adding the word “feloniously.” The prisoner was found guilty upon the amended indictment. *Held*, on a case reserved that the indictment

without the word feloniously was bad. *Held*, (by Allen, C. J., Weldon, Fisher and Duff, J. J., Wetmore, J., diss.) That although the objection to the indictment in this case was taken before plea pleaded, and that technically the trial does not begin till after the prisoner has pleaded to the indictment, and the jury are being called and sworn; yet that such a liberal construction should be put upon the words—"during the trial"—in Rev. Stat. cap. 159, sec. 22. Consol Stat. p. 1088, that the provisions of this chapter relating to reserving questions for the consideration of the Supreme Court should be held to apply to any of the proceedings in the Court below after the indictment has been found. *Regina v. Morrison*, 2 P. & B. 682.

#### DAMAGES.

**When doubtful as to what trespass damages have been given by jury.**

See New Trial, (Addenda.) *Gagnon v. Chapman et al.*, 2 P. & B. 440.

**Adjoining land owners—Defendant not filling up cellar—Plaintiffs' default—When defendant not liable.**

See Action at Law, (Addenda.) *Trustees St. John Young Men's Christian Association v. Hutchinson et al.*

**Acceptance of goods subsequent to time agreed upon for delivery—When cannot be set up as defence or reduction of damages.**

See Assumpsit, (Addenda.) *Moffat v. Lunt*.

**Defective machinery—Bad sawing therefrom—Limitation of damages after defect known.**

Where plaintiff claimed damages for bad quality of lumber sawed in consequence of defective machinery sold by defendants, it was *Held*, That the damages must be confined to the sawing for a reasonable time after plaintiff had an opportunity of judging of the defects, and notifying defendants to have them remedied. *Morrow v. The Waterous Engine Co.*, 2 P. & B. 509.

#### DEED.

**Voluntary conveyance—Deed to Son—Bona fides of consideration—Question for jury—Surrounding circumstances considered in determining matter.**

While a suit was pending by the female lessor of the

plaintiff against C. W. N., he conveyed all his real estate to his son, W. P. N. The consideration expressed in the deed was \$1,200, but there was no evidence to show that that sum or any sum had been paid, and the fair inference from the age, position and circumstances of W. P. N., was that he never had any such sum with which to pay for the property, and there were other circumstances connected with the conveyance which were calculated to throw suspicions upon its being *bona fide*. The property was sold under execution and bought by the female lessor, who brought ejectment. The jury found that the conveyance was voluntary and fraudulent and made for the purpose of defeating the judgment of the lessor of the plaintiff.

On motion for new trial on the ground of verdict being against evidence, it was *Held*, That the jury were justified in so finding.

No certain rule can be laid down as to what is an honest transaction, or the opposite. Every case must stand on its own footing, and the Court or jury must consider whether, having regard to all the circumstances, the transaction was a fair one, and was intended to pass the property for a good and valuable consideration. *Doc dem. Jones and Wife v. Nevers*, 2 P. & B. 627.

#### DELIVERY.

**Delivery and acceptance of goods subsequent to time agreed upon for delivery—When cannot be set up as defence or in reduction of damages.**

*See Assumpsit, (Addenda.) Moffat v. Lunt.*

#### ELECTION

**Of abandonment of trespass.**

*See Abandonment.*

#### EVIDENCE.

**Letters and conversation previous to letter containing contract—Improper reception in evidence—Warranty or representation.**

Defendants who were manufacturers of steam engines and mill machinery, sent plaintiff a pamphlet containing drawings of engines and mill machinery manufactured by



them, with the prices, and and of circular saws for which they were agents. At foot of price list of their engines it was stated, "Our engines are all warranted to work up to the power stated, and to give entire satisfaction if properly managed." Subsequently, in March 1871, plaintiff received a letter from defendants acknowledging receipt of a letter from him in which there were certain statements as to the working capacity of their engines, they also wrote him again in December 1871, in answer to a letter received by them from plaintiff. In the summer of 1871 also, plaintiff had a conversation with one of the defendants, in which the latter represented how much lumber the mill would cut a day. After this, in March 1872, plaintiff wrote defendants as follows: "You will please make me one of your 40 horse power cut-off engines with tubular boiler, iron smoke pipe and all irons complete, &c., (stating price and conditions as to payment and delivery,) to which defendants assented. The engine and machinery having proved, as plaintiff alleged, defective, he brought an action to recover damages, and gave evidence of the letters of March and December 1871, and of the conversation in the summer of that year. *Held*, That they were improperly received in evidence as forming part of the contract, and that the contract was contained in plaintiff's letter of March 1872, and defendants' acceptance of it which contained no warranty or representation. *Morrow v. The Waterous Engine Company*, 2 P. & B. 509.

**Licensed tavern keeper — Defendants admission of being such, admissible against him.**

*See* Justice of Peace, (Addenda.) *Birmingham Ex parte.*

Purchasers of liquor competent witnesses to prove selling. *Ibid.*

**Assault by husband on wife—Wife a competent person to make the complaint.**

*See* Husband and Wife, (Addenda.) *Ex parte Abel.*

**Corporation of St. John—Filling in street and erecting fence—Evidence of negligence should be left to jury.**

*See* Action on the Case, (Addenda.) *Pattison v. Mayor, &c., St. John.*

**Insanity of brother of testatrix — Testamentary capacity.**

Where, on the trial, the question was, as to the testamentary capacity of the testatrix. *Held*, by Weldon, J., That it was not competent to prove insanity of a brother as being a collateral matter and irrelevant evidence. *Doe dem. Hazen v. Rector, &c., St. James Church*, 2 P. & B. 479.

**Trespass—Joint and several—Giving evidence of separate trespasses, no abandonment of joint trespass proved.**

*See New Trial, (Addenda.) Gagnon v. Chapman.*

**EXECUTION.****Execution against husband—Levy on wife's property  
—No removal or touching of goods—Nominal sale  
—Effect of.**

*See Trover, (Addenda.) Smith and wife v. White.*

**FISHERIES.****Regulation and protection of Fisheries—Provincial right—Granted lands—Grantee's right in bed of rivers.**

The general power of regulating and protecting the fisheries in this Province is in the Parliament of Canada, but a license by the Minister of Marine and Fisheries to fish in fresh water rivers, which are not the property of the Dominion, or in which the soil is not in the Dominion, is illegal.

Where the lands on fresh water rivers have been granted, the exclusive right of fishing is in the riparian owner, and where they have not been granted, (with the exception of land owned by the Dominion Government) the right is in the crown for the benefit of the people of New Brunswick.

The right of fishery does not depend upon the ownership of the bed of the river, but of the bank; it depends upon the lateral and not the vertical contact of the water of the river. The title to the bed and waters of the North West Miramichi where it runs through lands granted to the Nova Scotia and New Brunswick Land Company, is in that

Company with the exception of those places where the lands on the river had been previously granted. *Steadman v. Robertson, et al., Hanson v. Robertson, et al., 2 P. & B. 580.*

### FRAUD.

**Voluntary conveyance—Honesty of transaction.**

*See Deed, (Addenda.) Doe dem. Jones v. Nevers.*

**Charge of fraud under Insolvent Act.**

*See Insolvent Act, (Addenda.)*

### HUSBAND AND WIFE.

An assault is none the less a breach of the peace because it is committed by the husband upon the person of his own wife—and the wife is a competent person to make the complaint. *Ex parte Abel et al., 2 P. & B. 600.*

### INFORMATION.

**Wife a competent person to make a complaint against husband for breach of the peace.**

*See Husband and Wife, (Addenda.)*

### INSOLVENT ACT OF 1875.

**Fraud—Charge of under sec. 136—Averment.**

An averment charging defendants with fraud under section 136 of the Insolvent Act of 1875 need not allege that the defendants have gone into insolvency: *Quere*, Whether that section is restricted in its application to persons whose estates are being administered in insolvency. *Barry v. Hegan, 2 P. & B. 465.*

### JOINT OWNERS.

**Misuse of property by one joint owner—When action maintainable.**

*See Action at Law—Negligence, (Addenda.) Danville v. O'Brien.*

### JUSTICE OF PEACE.

**Selling spirituous liquors on Sunday—Licensed tavern keeper—Necessity of proof of being—Admissions of defendant—Purchasers of liquor competent witness to prove selling.**

In proceedings for the recovery of a penalty for selling

liquors on Sunday contrary to the provisions of 88 Vic. cap. 71, it must be made to appear that the defendant is a licensed tavern keeper; and where the defendant pleaded not guilty, but admitted that he was a licensed tavern keeper, and the only other evidence of his being a licensed tavern keeper was that of a witness who stated that he knew where defendant's licensed tavern was, it was held, that this was sufficient evidence of the fact; and that it was not improper for the magistrate to take the defendant's admission as evidence against him. The persons who purchase the liquor are competent witnesses to prove the selling. *Ex parte Birmingham*, 2 P. & B. 564.

**Information**—Wife a competent person to make complaint in case of assault by husband on her.

See Husband and Wife, (Addenda.) *Ex parte Abel*.

#### JUSTIFICATION.

**Writ of attachment** gives on its face sufficient justification to officer.

See Affidavit, (Addenda.) *Burke v. Clarke*.

#### JUDGE'S ORDER.

**A Judge's order** can be made a rule of Court on production of the order with counsel's signature, but only during term.

*McLeod v. James*, 2 P. & B. 489.

#### LIEN.

**Not applicable** as plea in trover.

See Pleading. *Nevius v. Schofield*.

#### MASTER AND SERVANT.

**Injury to servant**—Death of master—Survival of action—Declaration alleging contract.

A declaration against executors of S., alleged that plaintiff entered into the service of testator as a workman in his mill upon the terms and conditions, amongst others, that he (S.) should take proper means and precautions to prevent damage happening to him, and not to expose him to unreasonable and unnecessary risk or danger; that

while plaintiff was in such employ upon said terms, he was employed by S. to work in said mill in a place where it was dangerous, &c., after dark, which was unknown to plaintiff, and in consequence thereof was struck by a piece of timber and his leg broken, &c. It being objected on demurrer that this being an action of tort, did not survive against the representatives of deceased.

*Held*, by Wetmore and Duff, J. J., (Weldon, J., *dissenting*), that as the declaration alleged in terms a contract and breach of it, it showed a cause of action which survived against the defendants. *Conolly v. Shires et al., executors of William Shires, deceased.* 2 P. & B. 606.

#### MORTMAIN.

*See* British Statutes, (*Addenda*).

#### NEGLIGENCE.

*See* Action on the case, (*Addenda*).

#### NEW TRIAL.

**Agreement to leave all matters to jury—Binding effect of—No cause of action shewn.**

When both parties on the trial of a cause, by their counsel agreed that the claims which they were putting forward on both sides should all be left to the jury without any objection being made as to the legal liability upon such claims, and the jury found for plaintiff; *Held*, That defendant could not afterwards move for a new trial on the ground that plaintiff failed to shew any cause of action. *Foxwell v. Smith*, 2 P. & B. 439.

**Trespass—Joint and several—Election and abandonment—Damages not plainly appearing to be confined to one act of trespass—Evidence of separate trespass—Effect of—Time of election—Judge's discretion.**

In an action of trespass *qu. cl. fr.* against several defendants, a joint act of trespass was proved against defendant C. and his co-defendants, by C. entering on the land with the other defendants, and making a survey and running the lines, after which several distinct trespasses were

committed by the other defendants, in which however C. took no part. Plaintiff being required to elect, stated that he would go for the trespass of entering on the land and running the lines, and the consequences which would follow therefrom ; and in addressing the jury he urged that defendant C. was liable for the necessary consequences of his survey, and that plaintiff's land had been damaged to the extent of £300.

The jury found a verdict for plaintiff for \$250. On motion for a new trial, the court granted the application, not being satisfied that the jury had confined the damages to the one act of entering on the land and running the lines, or that they had not taken into consideration the subsequent acts of the other defendants cutting down the wood &c.—imposing however on defendant terms of payment of costs.

*Held also*, that plaintiff by giving evidence of separate trespasses by some or one of defendants did not thereby abandon the joint trespass previously proved against all.

It must be in the judge's discretion whether he will require plaintiff's Counsel to elect at close of his case, or at a later period of the trial. *Gagnon v. Chapman, et al.*, 2 P. & B. 440.

**Opinion expressed by judge—Question left to jury.**

In an action where the question being tried is the competency of the testatrix to make a will, it is no misdirection for the judge to state as his opinion that the party contesting the will has failed to establish that the testatrix was subject to delusions, provided the evidence relied on as shewing delusions, and the question of sanity or insanity are left to the jury. *Doe d. Hasen v. Rector &c. St. James Church*, 2 P. & B. 479.

**Cause tried out of its term—Costs.**

Where a cause was tried out of its order in the absence of the defendant, on the statement of the plaintiff's counsel that it was undefended, the Court granted a new trial without costs, on an affidavit of the defendant's attorney, that the defendant had a good defence and intended to defend

the action. *Held* by Wetmore and Duff, J. J., Weldon, J., dissenting. *McIntosh v. Hamilton*, 2 P. & B. 654.

Motion for a new trial on a feigned issue sent down by Supreme Court in Equity must be made before a Judge in Equity. *Pomares v. Minas Marine Ins. Co.* 2 P. & B. 654.

**Negligence**—Not leaving evidence of Corporation exercising powers carelessly.

See Action in the Case, (Addenda.) *Pattison v. Mayor, &c., St. John.*

**Evidence**—Voluntary conveyance—Question for jury as to transaction being bona fide—Right of jury to find according to surrounding circumstances.

See Deed, (Addenda.) *Doe dem. Jones v. Neviers.*

#### PLEADING.

**Trover**—Claim of lien for commission charges, &c.—

Plea not traversing right of property—Evidence of lien when may be given and to what plea applicable.

To a declaration "for that defendants converted to their own use, or wrongfully deprived plaintiffs of the use and possession of plaintiff's corn," defendants pleaded that they were brokers and commission merchants, and that said corn was placed in their hands as such brokers and commission merchants by plaintiffs for sale or return, and defendants had necessarily incurred costs charges and expenses in the storing and safe custody thereof whilst so in their hands; wherefore they claimed a lien upon the corn therefor until such lien should be satisfied, and that defendants refused to return said corn until such costs, charges and expenses were paid which was the grievance complained of; *Held*, That the plea was clearly bad; that it was applicable to an action of detinue only, and was no answer to an action for wrongful conversion. *Nevius v. Schofield*, 2 P. & B. 435.

**Insolvent Act of 1875**—Charging fraud under sec 136

Not necessary to allege that defendants have gone into insolvency.

*Barry v. Hegan*, 2 P. & B. 465.

**Injunction order—Allegation that defendant falsely procured same—whether sufficient.**

See Action on the case, (*Addenda.*) *Collins v. Everett*, 2 P. & B. 469.

**Tort—Duty arising out of contract of employment—Proper mode of denying the existence of the duty to use diligence is by traversing the employment.**

See Action on case—Negligence, (*Addenda.*) *Domville v. O'Brien*.

**Joint owners—Joint ownership no answer to action for misfeasance and misuse of property.**

See Action on case—Negligence, (*Addenda.*) *Domville v. O'Brien*.

#### PORTLAND (TOWN OF.)

**Police Magistrate — Conviction before — Certiorari taken away—Proceedings on review.**

Where there is a proper information upon oath, before the Police magistrate of the Town of Portland, charging an offence within his jurisdiction, the party desiring to impugn the correctness of the magistrate's decision must proceed under 11 Vic. cap. 12, sec. 37, (Acts of New B'k. and 33 Vic. cap. 33, (Acts of Canada), the remedy by *certiorari* being taken away. *Ex parte Abel et al.*, 2 P. & B. 600.

#### PRACTICE.

**Judge's order—Making same a rule of court.**

A Judge's order can be made a rule of court on production of the order with counsel's signature, but only during term. *McLeod v. James*, 2 P. & B. 439.

#### PRACTICE IN EQUITY,

**Costs—Appeal from Equity Court—Whether same should lie.**

See Costs, (*Addenda.*) *Sayre v. Harris*.

Motion for new trial on a feigned issue sent down by Supreme Court in Equity must be made before a Judge in Equity. *Pomares v. Minas Ins.Co.*, 2 P. & B. 654.

#### PRINCIPAL AND AGENT.

The question of agency is for the jury. When W., a student at law, was in the habit of receiving, whilst a student in the office of defendant, letters for defendant



from the post-office, his agency after he is admitted an attorney is not necessarily continued, although he occupies by permission of defendant a portion of his office, and had access to the defendant's post-office box whenever he wished—it being no longer his duty to bring to defendant his letters, and W. never having had any authority to open defendant's letters, and never having opened them to defendant's knowledge, and defendant cannot be made liable for money received by W. on collection of a note, there being no evidence of a retainer by defendant.

Neither could the defendant be liable for a conversion until after the money came into his hands. *Eastern Township Bank v. Hannington*, 2 P. & B. 631.

**The agent of plaintiff having means of knowledge of conditions endorsed on a way bill, plaintiff bound by them.**

*See Carrier, (Addenda.) Armstrong v. G. T. Railway.*

### PROCESS.

Writ of attachment which is good on its face is a sufficient justification to officer, and he is not bound to examine the affidavit attached to the writ. *Burke v. Clark*, 2 P. & B. 662.

### ST. JOHN COMMON COUNCIL.

**Power to pass by-law subjecting persons to imprisonment—Contingent in case goods cannot be levied on.**

*See By-law, (Addenda.) Regina v. Gilbert.*

### TRESPASS.

**Damages—Joint and several trespass—When doubtful as to what trespass damages given.**

*See New Trial, (Addenda.) Gagnon v. Chapman et al., 2 P. & B. 440.*

**Execution against husband—Levy on wife's property—No removal or touching of goods—Nominal—Sale—Effect of.**

*See Trover, (Addenda.) Smith and Wife v. White.*

**TRIAL.**

**Right to begin—Right of reply—Ejectment by heirs-at law—Admission of heirship and ancestor being seised.**

On the trial of an action of Ejectment brought by the heir at law, where defendant's Counsel admits the heirship of the lessor of the plaintiff, and that his ancestor died seised of the property sought to be recovered, but set up a will in his (defendant's) favor, defendant is entitled to begin, and to have the general reply. *Doe d. Hazon v. Rector &c. St. James Church*, 2 P. & B. 479.

**Trespass—Abandonment—Election of trespass time for, in discretion of judge.**

See New Trial, (Addenda.) *Gagnon v. Chapman*.

**TROVER.**

**Levy and sale of wife's property under execution against husband—No touching or removal of goods from plaintiff's possession.**

Where a Sheriff having in his hands an execution against S. made a levy upon goods belonging to the wife of S. and went through the form of a sale, but took no possession of the property, which was neither removed or touched, the husband and wife afterwards brought an action of trespass and trover against the Sheriff; *Held* that as the goods were the wife's, the levy and sale did not affect her property, and as they were neither removed or touched there was neither trespass nor conversion. *Smith and wife v. White, Sheriff &c.* 2 P. & B, 443.

**Lien—Plea of.**

See Pleading, (Addenda.) *Nevins v. Schofield*

**RIGHT TO BEGIN.**

**Where defendant in ejectment has right to begin and right of general reply.**

See Trial, (Addenda.) *Doe d. Hazen v. Rector, &c., St. James' Church*.

**RATIFICATION.**

**Writ issued without authority—Subsequent adoption and ratification.**

See Writ, (Addenda.) *Albert Mining Co., v. Spurr*.

**WARRANTY.****Fitness of article for purpose intended.**

Where a party orders an ascertained article, there is no implied warranty that it is fit for the purpose for which he ordered it. The rule however is otherwise where the article is not ascertained; and where plaintiff ordered machinery from defendants; *Held*, That the latter were bound to supply such machinery as was reasonably fit for the purpose for which they knew it was intended. *Morrow v. The Waterous Engine Co.*, 2 P. & B. 509.

**WITNESS.****Medical witness—Stating conclusions.**

A medical witness may state the conclusions he has arrived at as to the capacity of testatrix to transact business, and to make an intelligent disposition of her property, from the circumstances known to him, without first stating the facts upon which he bases his conclusions; per Fisher J., but contra, per Weldon J., who held that all the facts and circumstances must first be given by the witness before he can state the conclusion he has drawn from them so that the jury having the facts before them can themselves determine what weight should be attached to the conclusion drawn by the witness. *Doe d. Hazen v. Rector &c.*, *St. James' Church*, 2 P. & B. 479.

**WRIT.****Writ—Issue of without authority—Confirmation by party having no authority at time of issuing writ but having subsequent authority.**

On an application made to set aside the writ of summons in a cause on the ground that it had been issued without authority, when the act was afterwards adopted and ratified by the parties then having authority to do so but who had no such authority when the writ was issued. *Held* (by Fisher & Wetmore J. J., Weldon J., dissenting) that such ratification was sufficient although the parties ratifying had no power to do so when the writ was issued. *Albert Mining Co.*, v. *Spurr*, 2 P. & B. 665.

**Writ good on its face—A justification to officer.**

See Justification, (Addenda.)

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